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CIS

FEDERAL TORT CLAIMS ACT

HEARINGS

BEFORE THE

SUBCOMMITTEE ON AGENCY ADMINISTRATION

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

NINETY-SEVENTH CONGRESS

FIRST SESSION

ON

S. 1775

A BILL TO AMEND TITLE 28 OF THE UNITED STATES CODE TO PROVIDE FOR AN EXCLUSIVE REMEDY AGAINST THE UNITED STATES IN SUITS BASED UPON ACTS OR OMISSIONS OF UNITED STATES EMPLOYEES, TO PROVIDE A REMEDY AGAINST THE UNITED STATES WITH RESPECT TO CONSTITUTIONAL TORTS, AND FOR OTHER PURPOSES

NOVEMBER 13 AND 16, 1981

Serial No. J-97-69

PART 1

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE
89-232 O WASHINGTON : 1982

5521-38

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FEDERAL TORT CLAIMS ACT

FRIDAY, NOVEMBER 13, 1981

U.S. Senate,
Subcommittee on Agency Administration,
Committee on the Judiciary,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:30 a.m., in room 357, Russell Senate Office Building, Hon. Charles E. Grassley (chairman of the subcommittee) presiding.

Staff present: John Maxwell, chief counsel and staff director, and Lynda Nersesian, counsel.

OPENING STATEMENT OF SENATOR CHARLES E. GRASSLEY

Senator **Grassley**. I now call this hearing to order. We are here today to consider S. 1775.[1]

S. 1775 would make the United States the exclusive defendant in all common law and constitutional tort actions arising out of acts or omissions of Government employees acting within the scope of their employment.

The situation that exists because these cases are not covered under the Federal Tort Claims Act is an unsatisfactory one from the perspective of all parties concerned. From the point of view of the Federal employee, the specter of personal lawsuits is harmful to morale, serves to chill vigorous and effective public action, and is inherently unfair to the individual attempting to fulfill his Federal mission.

From the point of view of the plaintiff, the pursuit of a Federal official through a personal action is expensive, exhaustive, and unlikely to result in a collectible judgment.

From the point of view of the Government, personal action entails expenditure of large resources, great complexity in the defense of the individuals, and complications such as the existence or assertion of conflicts of interest between multiple dependents or between the United States and one or more individual dependents.

In introducing this legislation, I started from two basic premises: First, the average Government employee is competent and conscientious. He or she wants to earnestly carry out whatever function has been assigned. I think I can safely make such a generalization for, while several thousand constitutional tort claims actions have been filed against Government employees, only nine out of those several thousand have resulted in money judgments.

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[1] A copy of bill S. 1775 and excerpts from appendix 1, the Federal Tort Claims Act, appear in the appendix.

Second, where a plaintiff is successful, Government employees are ordinarily unable to pay substantial damages. Litigating a constitutional claim, is exhausting, expensive, and unlikely to result in a collectible judgment as the law currently exists.

The fact that this legislation makes the United States exclusively liable has been misunderstood, I think, by some in that it is thought to undercut accountability. Again, if we measure accountability by the number of recoveries that people have gained in bringing suits against individuals, we see that there have only been nine awards out of several thousand actions that have been brought.

But then, even though these suits do not result in the payment of money judgments, they do involve what can only be described as a debilitating experience for the Federal employee. There is much time spent in discovery, much money expended by the Government in providing for private counsel and much stress placed on the Government employee being sued. These employees must live day in and day out with the idea that they could be personally subjected to enormous judgments for doing essentially what they are paid to do.

We have with us today a forest ranger from the Idaho panhandle who will share his experience of being sued for disposing of what he took pains to determine was abandoned property.

To the extent that accountability is a concern and should be a concern, the bill provides that if a civil action or proceeding arising under the Constitution results in a judgment or any award against the United States, the Attorney General shall forward the matter to the head of the department or agency which employed the employee at the time of the act or omission for a further administrative investigation or disciplinary action.

The legislation before us today would redefine the relationship between the Federal employee and the counterproductive burden now weighing on the shoulders of Government employees, the possibility of being held liable for a sizable judgment in a suit brought against him for the ways he or she perform a job. It would permit a citizen aggrieved by a Federal employee to sue the U.S. Government, a financially responsible defendant.

Our first witness today is Mr. Edward C. Schmults, Deputy Attorney General with the Department of Justice. Mr. Schmults, we welcome you as I have privately, and we are interested in hearing what you have today. I want to thank you for your Department's help in working on this legislation before its introduction.

STATEMENT OF EDWARD C. SCHMULTS, DEPUTY ATTORNEY GENERAL, DEPARTMENT OF JUSTICE

Mr. SCHMULTS. I am pleased to appear before this subcommittee in support of S. 1775, which would make the Government liable for constitutional torts and generally the exclusive defendant in all tort suits involving Government employees acting within the scope of their employment. The administration's views reflect continuity with the position of prior administration, which elicited broad bipartisan support. Case law eviscerating traditional doctrines of official immunity make congressional action imperative.

At present, the Federal Tort Claims Act makes the Government liable for tort claims based on the negligent or wrongful act or omission of any Government employee while acting within the scope of his office or employment, such liability to be determined "in the same manner and to the same extent as a private individual under like circumstances."

There are some specifically enumerated exceptions to this general grant of tort jurisdiction and liability, such as cases involving discretionary Government functions, assault and battery, and claims arising in foreign countries.

Although Congress has enacted several specific provisions that make the Government the exclusive party in certain situations, a plaintiff is generally permitted to sue both the Federal employee allegedly responsible for misconduct as well as the United States. Suits against Government employees in their personal capacity quickly dispel the widespread misconception that they are shielded from personal liability for their official acts.

In 1971, the Supreme Court, in *Bivens* v. *Six Unknown Named Agents,* declared that congressional authorization was not required to expose individual Federal officials to personal liability for violations of fourth amendment rights. Since that decision, there has been an exponential increase in the number of lawsuits seeking redress directly from the individual defendant's personal resources, rather than from the Government.

The United States can generally invoke sovereign immunity as a defense in *Bivens* suits, which are popularly labeled "constitutional" tort actions. The hallmark of a constitutional tort claim is a complaint against a public official seeking damages for an alleged violation of the Constitution, such as the fourth or fifth amendment.

The Supreme Court has repeatedly widened the exposure of Federal officials to damage liability for constitutional torts since Bivens. The Court has countenanced a damage suit against a congressman under the fifth amendment, and suit against prison officials under the eighth amendment, even though an alternative remedy, the Federal Tort Claims Act, was available.

The Court also recently affirmed by a 4 to 4 vote, a decision by the U.S. Court of Appeals for the District of Columbia Court Circuit holding that the President of the United States could be held personally liable in tort damages for acts done in the course of his duties.

Subordinate Federal courts have extended the *Bivens* constitutional tort theory to claims bottomed on virtually any constitutional infraction. The Department estimates that there are at present 2,000 lawsuits pending against Federal officials in their individual capacities. Several of these lawsuits involve multiple defendants, some as many as 30 to 45. Initially, *Bivens* suits were primarily filed as a result of incidents involving law enforcement activities; in recent years, however, such suits increasingly have arisen out of regulatory or personnel actions taken by Federal officials.

A U.S. district court ruling in 1980 holding members of the former Civil Service Commission potentially liable under the fifth amendment for allegedly disclosing derogatory allegations against a job applicant to another agency without notice and an opportunity to be heard is exemplary of this trend.

A similar ruling was issued a few months ago against officials of the former Community Services Administration. *Bivens* actions have subjected countless Federal employees to vexatious litigation and encouraged a timid discharge of official duties because of the fear of lawsuits.

While several thousand constitutional tort actions have been filed, only nine have eventuated in money judgments against Federal employees, which illustrates the fidelity to constitutional norms exhibited by virtually all Federal officials. Prudence, nevertheless, dictates the construction of statutory safeguards against adverse judgments against individual employees.

The existing law of Government and employee tort liability lacks any organizing or coherent principles. While the driver of a negligently driven Government vehicle is shielded from suit, the President and certain members of the U.S. Senate have been sued as individuals for monetary damages based on the allegedly wrongful disposal of the Panama Canal. While an employee cannot be sued for the unlawful seizure of a seagoing vessel, an employee can be sued for the wrongful seizure of other items.

While tax collectors in some circumstances are immune from suits, customs collectors are not. Government lawyers in those instances in which they represent individuals can be sued for malpractice. Most Government doctors cannot. Although Government employees cannot be sued individually for patent infringement, Government flight controllers have been sued as individuals for damages arising from airplane disasters.

The spector of personal lawsuits depresses morale, chills vigorous and effective public action, and unfairly burdens the conscientious public official in executing his or her Federal duties.

Augmenting these problems is the fact that the Federal Tort Claims Act generally does not foreclose lawsuits against both the Government and individual Federal employees for common law or nonconstitutional torts. Moreover, no general provision exists for indemnification of a sued Federal official. Thus, a Federal official must daily confront the hazard of incurring personal financial loss for actions taken in the course of duty.

The victim of a constitutional tort is equally disserved under existing law. Litigating a constitutional claim is expensive, exhaustive, and unlikely to result in a collectible judgment against a Federal employee. The Government is liable only for intentional torts arising from assault and battery, false imprisonment, false arrest, malicious prosecution, and abuse of process, and then only if the tortfeasor is an "investigative or law enforcement officer." Even if successful, the plaintiff has difficulty proving substantial actual damages from the violation of a constitutional right, and if the damages can be proven, Government employees ordinarily would be unable to pay.

Finally, the present system of employee liability is also counterproductive for the Government. The *Bivens* action entails expenditure of large resources and great complexity in the defense of individuals. Although employees acting within the scope of their employment are defended by Department of Justice attorneys, the

Government often must retain private attorneys when ethical considerations preclude representation by Government attorneys.

For example, it is inappropriate for a Department of Justice attorney to represent an employee whose conduct may be under criminal investigation, or when multiple defendant employees raise inconsistent defenses. In some cases, the best interests of the defendant require the raising of technical or substantive defenses which the Department is reluctant to raise or is combating in other unrelated litigation. Such anguishing difficulties have repeatedly confronted the Department and individually sued defendants.

The Department's private counsel program is expensive. Despite hiring at much less than the prevailing rate, the Department has spent over $3 million for private counsel since 1976. Whether taxpayers should underwrite the action of unsupervised attorneys advancing arguments which may be inconsistent with the legal policies of the Government is, at a minimum, questionable. Moreover, the presence of the individual employee and his private counsel makes the lawsuit difficult to settle.

These manifold flaws in the current law of official liability would be removed by the enactment of S. 1775, and we enthusiastically endorse the bill. S. 1775 would make the Government the exclusive defendant in virtually all constitutional tort actions in which the Attorney General certified that the employee was acting within the scope of his employment. Furthermore, subject to the exceptions enumerated in 28 United States Code, section 2680, the Government would likewise be exclusively liable for common law torts. In addition, for the first time, the United States could be sued a *Bivens* or constitutional tort. The exclusive remedy in such a case would also be against the United States.

One feature of the bill we especially approve is the retention of the qualified immunity defense and such other immunity defenses as have been recognized by the courts in *Bivens* actions as available to an individual employee. We strongly believe that such defenses advance the public interest. They frequently disprove the merits of a claim by testing the acts of the challenged official against a standard of reasonableness and good faith. Sound economic reasons also counsel retention of the defenses, since provision is made for liquidated damages in the event of proof of a constitutional tort.

Furthermore, the employee and the agency have a professional interest in avoiding judicial reproaches for conduct which was motivated in good faith upon reasonable grounds. Finally, the absence of a good faith defense would make public officials reluctant to take action where the law is uncertain. To safeguard against the possibility of an adverse court judgment and financial liability, officials would be restricted to action that is indisputably legal. Regrettably, areas of legal certainty are diminishing, and eliminating a good faith defense could discourage progressive and enlightened policies in numerous areas where the law is unfolding or equivocal for fear of financial liability.

We do have one additional recommendation. Section 2672 of title 28, United States Code, which amended by S. 1775, provides for the administrative adjustment of claims up to $25,000 by the head of each Federal agency, in accordance with regulations prescribed by the Attorney General. Section 2672, whose purpose is to ease court congestion and avoid unnecessary litigation, was enacted in 1966 and has not since been amended. We suggest that the $25,000 figure be adjusted upward to $50,000, thereby increasing the authority of the agencies to settle or compromise claims from $25,000 to $50,000. Such an amendment would facilitate disposition of monetary claims by providing for greater agency flexibility. It would also enable the Department of Justice to devote greater attention to those cases which involve more difficult legal and factual issues.

In summary, I would emphasize once again that this legislation initiative offers a meaningful, attainable remedy to a citizen who has suffered a constitutional deprivation. At the same time, it dispels the cloud of potential personal liability that currently hangs over almost every Federal public servant. Through this legislation, the citizen can obtain redress and the public official can conscientiously perform his mission. The citizen, the Government and the public are all the beneficiaries.

Thank you very much, Mr. Chairman. I would be very happy to answer any questions that you have.

Senator **Grassley**. Thank you very much. We appreciate your testimony, and particularly appreciate the administration's support of the legislation.

I do have some questions.

First, how will this legislation affect the exclusionary rule?

Mr. **Schmults**. This legislation, Mr. Chairman, is really unrelated to the exclusionary rule. The administration's proposal on the exclusionary rule does, in effect, have a good faith concept. In other words, evidence would be admissible if the law enforcement officer has acted in good faith, believing that search or seizure was lawful.

There is a good faith defense in your proposal, which the administration supports under the Federal Tort Claims Act, but these amendments would not affect the exclusionary rule in any way. They are compatible, however, in that they would both, if the proposals were enacted, be consistent in that there would be a good faith defense under the Federal Tort Claims Act and there would be a good faith defense that would be operable in the area of the exclusionary rule.

Senator **Grassley**. So the unconstitutional evidence would still be brought in?

Mr. **Schmults**. In the exclusionary rule?

Senator **Grassley**. Yes.

Mr. **Schmults**. Yes. One of the principle purposes of the exclusionary rule is to deter unlawful conduct by law enforcement officials. The administration's proposal in the area of the exclusionary rule is that where the public official is acting in good faith, no deterrents can operate. Where you have, for example, a technical defect in a search warrant, there's no way that the law enforcement officer can know that when he is engaging in the search. Thus, if he has acted in good faith, the evidence that was obtained as a result of that search would be admissible in court. It might be that that target of the search would have a cause of action under the Federal Tort Claims Act, although I believe that the good faith defense, as we propose it, would be relevant and he would be able to recover damages from the Government. Our position is that there is no need for deterrents in that sort of a situation.

Senator **Grassley**. Do you think that this type of legislation that we're suggesting would increase the number of suits that are being brought against Federal employees?

Mr. **Schmults**. Against Federal employees?

Senator **Grassley**. Yes.

Mr. **Schmults**. Or against the Federal Government as such?

Senator **Grassley**. Well, in the case of the legislation passing, it would be against the Federal Government.

Mr. **Schmults**. Yes.

Senator **Grassley**. I guess maybe what I mean to ask is the number of cases that fall in this category.

Mr. **Schmults**. No, I don't believe the cases would increase. Our problem now is that they are increasing at an alarming rate when they can be brought against individuals. There are some, as I indicated in my testimony, 2,000 pending cases. On the average they involve, I believe, five defendants. Most of them involve multiple defendants, some as many as 35 or 45.

They are coming into our civil division at the rate of about 50 or 60 a month. We think if this legislation is passed that there will not be more suits brought against the Federal Government. First of all, we're recommending that the good faith defense be incorporated. That will act as a filter and will deter people from bringing lawsuits unless they believe the Government official has acted in bad faith.

Second, we believe many of these lawsuits are of a personal nature. They're really harassment suits brought against Government employees by people who have a personal ax to grind. I think the substitution of the Government will mean that those lawsuits will not be brought.

Third, the Federal Tort Claims Act provides for an exhaustion, in effect, of your administrative remedies and a 2-year statute of limitations which will tend to reduce the number of lawsuits.

Fourth, we are not recommending, and your bill does not provide for, the award of attorneys fees so that we see no real incentive for a large number of cases to generate attorneys fees.

Fifth, these suits don't generate large amounts of compensatory damages. So there's not a lot of incentive to bring them, again, for legal fees. Included, we believe there will be an offset, because the way we're handling these cases now is extremely expensive; it takes a lot of time to settle these cases, and, also, we have the cost of the private counsel fees. So there should be a saving and a benefit to the Government if this bill is enacted.

Senator **Grassley**. In their written testimony that was provided ahead of time, our distinguished witness from the ACLU suggests that we could substitute the device of impleader for this legislation. What do you think of that proposal?

Mr. **Schmults**. I don't think that really addresses the problem. The problem here is not really Government employees acting in an unlawful fashion. As you noted in your opening statement, there are only 9 lawsuits where that has been found or where damage has been recovered—I think that number may be 10 now. But in any event, that's an extremely small number.

The real problem here is the overhang of litigation and the burden on Government employees of having to deal with lawyers, having to be worried about their own cases. And impleader alone certainly is not going to solve that problem. It really is just adding a complexity which we don't think is desirable. We think there's a clean-cut, straightforward way to deal with the problems, and that is to substitute the Government as the defendant. We believe that adequate deterrents to unlawful conduct will remain with the provisions of this bill. And so, we see no reason why it shouldn't be done in a simple, straightforward way. There's no need to make litigation more complex. We ought to be striving to make it simpler.

Senator **Grassley**. Let's assume that this legislation is in place and that a judgment is found against a Federal employee and that Federal employee has changed positions to another Federal agency, as in a transfer. Can we still reach that employee for disciplinary action?

Mr. **Schmults**. I think there would still be a way, yes. As long as the Federal employee is still an employee, there could still be disciplinary proceedings.

Your question is getting to the deterrents point. Does this legislation mean that individual Federal employees will not be deterred? I think the threat of disciplinary proceedings is a very important deterrent. But I would like to note that there are other deterrents as well. For example, the criminal laws remain fully applicable. For any conduct that is of a criminal nature, the employee would be subject to a criminal action. Also, you have the threat of injunctions on equitable relief which could be granted by a court after the enactment of S. 1775.

Of course, you have, and I don't think we should minimize the deterrent effect of public criticism and the injury to professional reputation, where an employee is found to have engaged in unconstitutional conduct. And, in a very severe case, the employee might be found to be acting outside the scope of his or her employment and would then be subject to a private civil damage action.

Senator **Grassley**. As a followup on that, what about an employee that leaves that public sector and goes into private employment?

Mr. **Schmults**. Well, I think an important point to be kept in mind is that deterrence is probably not as important there. That employee is no longer a Federal official and therefore, cannot continue to take action under the authority of a Federal office. The points that I made earlier would still apply—to criminal laws would still be applicable, there would still be damage to the employee's reputation, and there could still be equitable relief. But when you look at the other benefits—I think it's important to keep those in mind—the plaintiff will have the U.S. Government as a solvent defendant able to pay damages. And so, when you weigh all of those points, it seems to me the balance comes out strongly in favor of enacting this legislation.

Senator **Grassley**. What about an individual, who in this instance, had a judgment rendered against him or her and then has gone into private employment and then later on returns to Federal Government employment?

Mr. SCHMULTS. Well, in that case, there should be some finality to an action like this. I suppose, in your example, if the plaintiff sued the U. S. Government and recovered and at the time of a judgment the employee who caused or who engaged in the misconduct was in the private sector, and then later came into the Government, it might well be that those circumstances could be taken into account in deciding as to whether or not that employee should be hired again. I would have to check the personnel rules and regulations on that. But it seems to me that if you're considering three people for a Federal job and one has been, in effect, been found responsible for or has engaged in constitutional misconduct for which the Government has had to pay, I would think that would be an important factor in the hiring decision.

Senator GRASSLEY. Does the head of an agency or a department have complete discretion as to how he will react to the forwarding of the disciplinary proceedings by the Attorney General?

Mr. SCHMULTS. Yes. It would be mandatory in a case where the Government loses or the case is settled and the Government makes a payment in settlement for the Attorney General to advise the head of the employee's agency of those facts so that disciplinary proceedings could be considered. And presumably, where justified, the head of that agency would decide to bring a disciplinary proceeding and the employee would be disciplined.

Senator GRASSLEY. For the purposes of developing our record, why should the United States have access to the employee's good faith defense?

Mr. SCHMULTS. Well, the good faith defense is, we think, an extremely important part of this bill. As I said in my statement, it really goes to the merits of the plaintiff's claim by testing the action of an employee against the standard of reasonableness and good faith. We also think that taxpayers' funds, funds out of the U.S. Treasury, should not be paid out for actions taken in good faith. And when you bear in mind that any payment of a claim carries with it the threat, in effect, of a disciplinary action against the employee later, it would be self-defeating if you were going to make payments where the employee has acted in good faith because it seems clear that there should be no disciplinary proceedings under such circumstances.

And certainly no employee wants to be found "guilty", if you will, of unconstitutional acts and suffer the resulting stigma. So that, even where the United States and not the employee would be the defendant, our view is that employees would be discouraged from acting in uncertain areas where they might subject the Government to financial liability. We should not deter employees from acting in good conscience and in good faith and from being courageous, particularly in the law enforcement and other essential areas of Government activities. So, we see this good faith defense as being a very important part of the bill.

Senator GRASSLEY. In the next to last paragraph of your testimony on page 9, you suggest that this bill would raise the administrative adjustment figure from $25,000 to $50,000.

As the regulations currently exist, they provide for an oversight function by the Department of Justice. Are you saying that we do not need this oversight function? And, I suppose that I might as well also ask: Does Justice always OK the settlement?

Mr. SCHMULTS. No; I think we would retain the oversight function. We're just suggesting that with the passage of time that it would make sense to raise that $25,000 figure to $50,000 simply as a result of inflation. The reason for it, basically, is the more of these claims that you can settle as an administrative matter, the less you will clog the courts and use valuable litigation resources; there would still be an oversight function in the Attorney General's hands.

Senator GRASSLEY. At this time, unless you have something more that you want to add, I would like to thank you very much for your testimony.

Mr. SCHMULTS. Thank you very much, Mr. Chairman. We are very pleased that you have introduced this very sound piece of legislation. All of us at the Department of Justice stand ready to work with you and your staff at any time to secure the enactment of this legislation which we regard as very important.

Senator GRASSLEY. We have at least 2 more days of hearings and at the end of those hearings we will see what sort of contact we'll have with you as we analyze the record.

Mr. SCHMULTS. Thank you very much.

Senator GRASSLEY. Thank you. We will enter your statement into the record at this time.

[The prepared statement of Mr. Schmults follows:]

PREPARED STATEMENT OF DEPUTY ATTORNEY GENERAL EDWARD C. SCHMULTS

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE:

I am pleased to appear before this Subcommittee in support of S.1775, which would make the Government liable for constitutional torts and generally the exclusive defendant in all tort suits involving Government employees acting within the scope of their employment. The Administration's views reflect continuity with the position of prior Administrations, which elicited broad bipartisan support. Case law eviscerating traditional doctrines of official immunity make congressional action imperative.

At present, the Federal Tort Claims Act makes the Government liable for tort claims based on the negligent or wrongful act or omission of any Government employee while acting within the scope of his office or employment, such liability to be determined "in the same manner and to the same extent as a private individual under like circumstances."1/ There are some specifically enumerated exceptions to this general grant of tort jurisdiction and liability, such as cases involving discretionary governmental functions, assault and battery, and claims arising in foreign countries. 2/

Although Congress has enacted several specific provisions that make the Government the exclusive defendant in certain situations, 3/ a plaintiff is generally permitted to sue both the federal employee allegedly responsible for misconduct as well as the United States. Suits against government employees in their personal capacities quickly dispel the widespread misconception that they are shielded from personal liability for their official acts.

In 1971, the Supreme Court, in Bivens v. Six Unknown Named Agents, 4/ declared that Congressional authorization was not required to expose individual federal officials to personal liability for violations of Fourth Amendment rights. Since that decision, there has been an exponential increase in the number of lawsuits seeking redress directly from the individual defendant's personal resources rather than from the Government. The United States can generally invoke sovereign immunity as a defense in Bivens suits, which are popularly labelled "constitutional" tort actions. The hallmark of a constitutional tort claim is a complaint against a public official seeking damages for an alleged violation of the Constitution, such as the Fourth or Fifth Amendment.

The Supreme Court has repeatedly widened the exposure of federal officials to damage liability for constitutional torts since Bivens. The Court has countenanced a damage suit against a Congressman under the Fifth Amendment, 5/ and suit against prison officials under the Eighth Amendment, even though an alternative remedy, the Federal Tort Claims Act, was available. 6/ The Court also recently affirmed, by a 4-4 vote, a decision by the United States Court of Appeals for the District of Columbia Circuit holding that the President of the United States could be held personally liable in tort damages for acts done in the course of his duties. 7/

Subordinate federal courts have extended the Bivens constitutional tort theory to claims bottomed on virtually any constitutional infraction. The Department estimates that there are at present in excess of 2,000 lawsuits pending against federal officials in their individual capacities. Several of these lawsuits involve multiple defendants, some as many as thirty to forty-five. Initially, Bivens suits were primarily filed as a result of incidents involving law enforcement activities; in recent years, however, such suits increasingly have arisen out of regulatory or personnel actions taken by federal officials. A United States District Court ruling in 1980 holding members of the former Civil Service Commission potentially liable under the Fifth Amendment for allegedly disclosing derogatory allegations against a job applicant to another agency without notice and an opportunity to be heard is exemplary of this trend. 8/ A similar ruling was issued a few months ago against officials of the former Community Services Administration. 9/ Bivens actions have subjected countless federal employees to vexatious litigation and encouraged a timid discharge of official duties because of the fear of lawsuits. 10/ While several thousand constitutional tort actions have been filed, only nine have eventuated in money judgments against federal employees, 11/ which illustrates the fidelity to constitutional norms exhibited by virtually all federal officials. Prudence, nevertheless, dictates the construction of statutory safeguards against adverse judgments against individual employees. 12/

The existing law of Government and employee tort liability lacks any organizing or coherent principles. While the driver of a negligently driven Government vehicle is shielded from suit, 14/ the President and certain members of the United States Senate have been sued as individuals for monetary damages based on the allegedly wrongful disposal of the Panama Canal. 15/ While an employee cannot be sued for the unlawful seizure of a sea going vessel, 16/ an employee can be sued for the wrongful seizure of other items. 17/ While tax collectors in some circumstances are immune from suits, 18/ customs collectors are not. Government lawyers in those instances in which they represent individuals can be sued for malpractice; most Government doctors cannot. 19/ Although Government employees cannot be sued individually for patent infringement, 20/ Government flight controllers have been sued as individuals for damages arising from airplane disasters. 21/ The specter of personal lawsuits depresses morale, chills vigorous and effective public action, and unfairly burdens the conscientious public official in executing his or her federal duties.

Augmenting these problems is the fact that the Federal Tort Claims Act generally does not foreclose lawsuits against both the Government and individual federal employees for common law or non-constitutional torts. Moreover, no general provision exists for indemnification of a sued federal official. Thus, a federal official must daily confront the hazard of incurring personal financial loss for actions taken in the course of duty.

The victim of a constitutional tort is equally disserved under existing law. Litigating a constitutional claim is expensive, exhausting and unlikely to result in collectible judgment against a federal employee. The Government is liable only for intentional torts arising from assault, battery, false imprisonment, false arrest, malacious prosecution and abuse of process, and then only if the tortfeasor is an "investigative or law enforcement officer." 22/ Even if successful, the plaintiff has difficulty proving substantial actual damages from the violation of a constitutional right, 23/ and if damages can be proven, Government employees ordinarily would be unable to pay.

Finally, the present system of employee liability is also counterproductive for the Government. The Bivens action entails expenditure of large resources and great complexity in the defense of individuals. Although employees acting within the scope of their employment are defended by Department of Justice attorneys, the Government often must retain private attorneys when ethical considerations preclude representation by Government attorneys. For example, it is inappropriate for a Department of Justice attorney to represent an employee whose conduct may be under criminal investigation, or when multiple defendant employees raise inconsistent defenses. In some cases, the best interests of the defendant require the raising of technical or substantive defenses which the Department is reluctant to raise or is combating in other unrelated litigation. Such anguishing difficulties have repeatedly confronted the Department and individually sued defendants.

The Department's private counsel program is expensive. Despite hiring at much less than the prevailing rate, the

Department has spent over three million dollars for private counsel since 1976. Whether taxpayers should underwrite the action of unsupervised attorneys advancing arguments which may be inconsistent with the legal policies of the Government is, at a minimum, questionable. Moreover, the presence of the individual employee and his private counsel makes the lawsuit difficult to settle.

These manifold flaws in the current law of official liability would be removed by the enactment of S.1775, and we enthusiastically endorse the bill. S.1775 would make the Government the exclusive defendant in virtually all constitutional tort actions in which the Attorney General certified that the employee was acting within the scope of his employment. Furthermore, subject to the exceptions enumerated in 28 U.S.C. 2680, the Government would likewise be exclusively liable for common law torts. In addition, for the first time, the United States could be sued for a Bivens or constitutional tort. The exclusive remedy in such a case would also be against the United States.

One feature of the bill we especially approve is the retention of the qualified immunity defense and such other immunity defenses as have been recognized by the courts in Bivens actions as available to an individual employee. We strongly believe that such defenses advance the public interest. They frequently disprove the merits of a claim by testing the acts of the challenged official against a standard of reasonableness and good faith. Sound economic reasons also counsel retention of the defenses, since provision is made for liquidated damages in the event of proof of a constitutional tort. Furthermore, the employee and the agency have a professional interest in avoiding judicial reproaches for conduct which was motivated in good faith upon reasonable grounds. Finally, the absence of a good faith defense would make public officials reluctant to take action where the law is uncertain. To safeguard against the possibility of an adverse court judgment and financial liability, officials would be restricted to action that is indisputably legal. Regrettably, areas of legal certainty are diminishing, and eliminating a good faith defense could discourage progressive and enlightened policies in the numerous areas where the law is unfolding or equivocal for fear of financial liability.

We do have on additional recommendation. 28 U.S.C. 2672, which is amended by S.1775, provides for the administrative adjustment of claims up to $25,000 by the head of each federal agency, in accordance with regulations prescribed by the Attorney General. Section 2672, whose purpose is to ease court congestion and avoid unnecessary litigation, was enacted in 1966 and has not since been amended. We suggest that the $25,000 figure be adjusted upward to $50,000, thereby increasing the authority of the agencies to settle or compromise claims from $25,000 to $50,000. Such an amendment would facilitate disposition of monetary claims by providing for greater agency flexibility. It would also enable the Department of Justice to devote greater attention to those cases which involve more difficult legal and factual issues.

In summary, I would emphasize once again that this legislative initiative offers a meaningful, attainable remedy to a citizen who has suffered a constitutional deprivation. At the same time, it dispels the cloud of potential personal liability that currently hangs over almost every federal public servant. Through this legislation, the citizen can obtain redress and the public official can conscientiously perform his mission. The citizen, the Government and the public are all the beneficiaries.

FOOTNOTES

1/ 28 U.S.C. 1346(b), 2672 and 2674.

2/ See 28 U.S.C. 2680.

3/ *E.g.*, 28 U.S.C. 2679(b) (drivers of motor vehicles); 38

U.S.C. 4116 (medical personnel employed by the Veterans Administration); 26 U.S.C. 7426(d) (employees levying on property to collect federal taxes immune from suit brought by persons other than the taxpayer claiming an interest in the property); 28 U.S.C. 1498 (employees sued for patent infringement); 46 U.S.C. 746 (employees sued for unlawful seizure of sea going vessels).

4/ 403 U.S. 388 (1971).

5/ Davis v. Passman, 442 U.S. 228 (1979).

6/ Carlson v. Green, 446 U.S. 14 (1980).

7/ Halperin v. Kissinger, No. 79-880, June 22, 1981.

8/ Doe v. United States Civil Service Commission, 483 F. Supp. 539 (1980).

9/ Conset Corporation, et al. v. Community Services Administration, et al., C.A.D.C., No. 80-1547, June 5, 1981.

10/ See, e.g., House Hearings at 31 (statement of John S. McNerney).

11/ ASKEW v. BLOEMKER, S-CIV-73-79 (S.C. Ill., Sept. 29, 1978). DEA agent was held personally liable for violating the Fourth Amendment rights of three plaintiffs by conducting a search without probable cause or a warrant; the jury awarded damages of $22,000; plaintiffs agreed not to enforce the judgment against the uninsured Federal agent but rather to proceed against defendant state employees who were insured.

SEGUIN v. HIGHTOWER, No. C76-182-V (W.D. Wash., Oct. 24, 1978). Customs agent held personally liable to the owner of an impounded car used in a smuggling scheme because the agent delayed four and one half months in initiating forfeiture action; the court awarded the plaintiff $7,300 for rental value of the car plus consequential damages; the case is on appeal.

JIHAD v. CARLSON, CA No. 5-71-805 (E.D. Mich., Oct. 18, 1976). Prison guard held personally liable for $992 to inmate for violating his right to religious freedom in placing him in segregation for refusing to shave his beard; the judgment was reversed on appeal.

WEISS v. LEHMAN, CA No. 375-36 (C.D. Idaho, July 14, 1978). Forest service ranger held personally liable for $1,000 for violating plaintiff's Fifth Amendment rights by destroying property owned by plaintiff which had been apparently abandoned; the Ninth Circuit Court of Appeals affirmed the judgment. A Petition for Writ of Certiori was filed in the Supreme Court. We have just been advised that the Court has granted the petition and remanded the case for reconsideration (No. 80-2159, Oct. 5, 1981) in light of Parratt v. Taylor, 49 USLW 4509, May 18, 1981.

HALPERIN v. KISSINGER, 424 F. Supp. 838 (D. D.C. 1976) and 434 F. Supp. 1193 (D. D.C. 1977). Former President Richard Nixon, H.R. Haldeman and John Mitchell held personally liable in damages for violating plaintiffs' Fourth Amendment rights in authorizing wiretaps.

DELLUMS v. POWELL, 566 F.2d 167 (D.C. Cir. 1977). Chiefs of U.S. Capitol and D.C. Police held personally liable for arrests at Capitol Building during anti-war demonstration in class action with 1,200 plaintiffs; a total judgment of approximately 2 1/2 million dollars plus interest was entered against all defendants and subsequently paid through Congressional action.

TATUM v. MORTON, 562 F.2d 1279 (D.C. Cir. 1977). Inspector of D.C. Police held personally liable for $500 for disrupting 29 demonstrators at the White House.

SCHONEBERGER v. HINCHCLIFFE, C.A. No. 76-234 (D. Vermont, Sept. 22, 1980). FBI agent personally held liable for $150 for retaining a firearm (for too long a period) seized during a raid for illegal aliens.

SAXNER v. BENSON, C.A. No. 75-47-C (S.D. Indiana 1981). Three members of a Federal Corrections Institution Disciplinary Committee held personally liable for $3,000 apiece for violating an inmate's procedural due process rights; a motion for reconsideration has been filed.

12/ In the Weiss case cited in the previous footnote, the plaintiff, for example, sought a total of $148,000 in damages. The jury thus could have awarded that amount against that forest ranger.

13/ 28 U.S.C. 2680(h).

14/ 28 U.S.C. 2679(b).

15/ Hohensee v. Carter, C.A. No. 78-345 (M.D. Pa.).

16/ 46 U.S.C. 745.

17/ See, e.g., Seguin v. Hightower, No. C-76-182-V (W.D. Washington, Oct. 24, 1978).

18/ 26 U.S.C. 7426(d).

19/ See, e.g., 38 U.S.C. 4116.

20/ 28 U.S.C. 1498.

21/ AETNA Casualty & Insurance Co. v. United States, 570 F.2d 1197 (4th Cir. 1978).

22/ 28 U.S.C. 2680(h).

23/ In Halperin v. Kissinger, 434 F. Supp. 1193 (D. D.C. 1977), for example, after plaintiffs proved that they had been subjected to unlawful telephone wiretaps for a period of twenty-one months, they were awarded nominal damages of $1 each.

Senator GRASSLEY. Before I call the next witness, I want to say that at 10:30 there are scheduled, in the Budget Committee, three back-to-back votes and we don't have a proxy rule in the Budget Committee so I'm going to have to go vote on those.

It is my wish, because I would rather not have staff take testimony, just to have short, brief recesses of the committee meeting, and my desire would be to go right through until we complete the hearing without breaking for lunch or anything.

So, I ought to apologize in advance. It may be that right in the middle of somebody's testimony I'll have to just recess the hearing to go to the Budget Committee because we don't have a 15-minute rule.

Our next witness is Mr. Mark Lynch with the American Civil Liberties Union.

I understand, Mr. Lynch, that due to his teaching schedule, Professor Neuborne is unable to testify today. Mr. Lynch, we appreciate your being here today and we're interested in hearing what you have to say on this legislation. Thank you very much.

Mr. LYNCH. Thank you very much, Senator.

We very much appreciate the opportunity to appear today on behalf of the American Civil Liberties Union. Professor Neuborne of the New York University School of Law has prepared a statement which we have submitted. I would like to extend Professor Neuborne's personal regrets for being unable to attend today because, as the Senator pointed out, he had a teaching commitment.

I think perhaps the most useful way for me to proceed, particularly in light of the time constraints that we're under, would be to summarize the statement, and if I could have the statement submitted in the record as written, I would appreciate that.

Senator GRASSLEY. Yes; that will be standard procedure for everybody who so wishes; their entire statement will be put in. And I would encourage witnesses to summarize so that we have time for questions.

Thank you. Proceed.

STATEMENT OF MARK H. LYNCH, STAFF ATTORNEY, AMERICAN CIVIL LIBERTIES UNION, ON BEHALF OF PROF. BURT NEUBORNE, NEW YORK UNIVERSITY SCHOOL OF LAW

Mr. LYNCH. Thank you.

The ACLU is opposed to S. 1775 because, while we are sympathetic to the problem of providing a deep pocket defendant so that people whose constitutional rights have been injured can recover adequately, and while we are also sympathetic to the problem of good faith defendants being needlessly enmeshed in litigation, and while we wish that these problems could be solved, we do not think that S. 1775 is the right way to do it.

We think that S. 1775 rests on a number of unsound policy judgments and may be unconstitutional as well.

There are three problems with S. 1775: It deprives or eliminates the concept of any individual personal accountability. It deprives victims of unconstitutional action the opportunity to recover punitive damages. And punitive damages are particularly important because the actual damages in these cases are frequently hard to ascertain.

For example, in the *Bivens* case, Webster Bivens was at home with his family, Federal agents broke into his house without a warrant—I mean, into his apartment—they roughed him up, they forced him to strip in front of his family. It was a humiliating, degrading experience. But it's very difficult to say what his actual compensatory damages were. In situations like that, the opportunity to recover punitive damages becomes very important.

Third, this amendment, the Federal Tort Claims Act, would deprive victims of unconstitutional action of a jury trial.

Now, we think this is all unsound policy and we think it may be unconstitutional as well because, in *Carlson* v. *Green,* the Supreme Court said that, while Congress could enact a substitute scheme for the *Bivens* cause of action, that substitute would have to be equally effective, and if it is not equally effective, then it would detract or derogate from the scheme that the courts have employed, which is to say that the *Bivens* cause of action, in order to remedy violations of constitutional rights. And we have serious questions as to whether the Congress can take away a remedy which the courts found necessary in the performance of their role to protect and vindicate constitutional rights without providing an equally adequate substitute.

S. 1775, as I have said, is inadequate in that it doesn't provide for a jury trial, it doesn't provide for punitive damages and it does have the same disciplinary deterrent component that the *Bivens* regime provides.

Now on this question of deterrents, I would also like to quote for the record today from a brief which Senator Hatch, Congressman Dornan and several other legislators recently submitted to the Supreme Court in the case of *Nixon* v. *Fitzgerald.* This is a case involving a well-known whistleblower who was discharged from his job at the Department of Defense because he presented testimony to the Congress about cost overruns, waste and inefficiency in Government.

In retaliation for this testimony, he was demoted and ultimately his job was reorganized and he lost his job. The allegation is that former President Nixon was personally involved in this case and Fitzgerald had the *Bivens* action against former President Nixon and others.

And this is what Senator Hatch and Congressman Dornan had to say:

> A *Bivens* cause of action serves an important deterrent function. To Congress, this deterrent function is critical. In order to deter wrongful discharge or intimidation, any remedy must be directed at the individual wrongdoer.

So I think that there is broad support of personal, individual accountability across a wide political spectrum. I would also like to point out that my experience has been that these suits against individuals have played an important role in reforming Government policies.

For example, I think that a number of cases in which Government officials have been charged with illegal wiretapping, has had a great deal to do with the last administration coming around to the position that foreign intelligence wiretapping should be subjected to legislative control and if these lawsuits really did play a part in the ultimate passage of the Foreign Intelligence Surveillance Act of 1978, I think that lawsuits against former officials of the CIA arising with improper domestic intelligence investigations has a lot to do with the CIA implementing new regulations which restrict those kinds of activities.

Also, from my own personal experience, I know of a case where high ranking U.S. Army officials were sued in their personal capacities, arising out of a series of highly improper investigations of American citizens residing in Germany. And I think the fact that those people were held personally accountable—I don't mean to say that a judgment was entered against them, but the fact that they could be held personally accountable had something to do with the Army undertaking a massive revision of its regulations with respect to the surveillance of U.S. citizens overseas.

So, contrary to Mr. Schmults' view that these are a needless thorn in the side of the bureaucracy, I think that these suits have a very important reform effect, not only in terms of individual's conduct, but in terms of overall policy as well.

But I would like to respond also to some of the points that emerged in your colloquy with Mr. Schmults, particularly the discussion of the good faith defense. If this legislation were to be enacted, I think that it is absolutely critical that the good faith defense be eliminated.

The good faith defense is developed in the *Bivens* action as a means of preventing money judgments unfairly against individuals who acted in good faith. It's designed to protect the individual. Now, if the Congress is to enact a scheme where the United States becomes the deep pocket defendant, the policy justification for imposing the good faith defense begins to evaporate.

Let me try to pull this down out of the abstract level of constitutional tort and provide a more homely analogy. Let us suppose that a police squad car sees—a policeman in a squad car sees someone commit a crime and the perpetrator takes off in his automobile. The squad car gives chase in hot pursuit and the officers, as they approach an intersection, decide that they have to run a red light. They turn on their sirens and their flashing lights. A little old lady is in the intersection and she doesn't hear the sirens or see the lights, and the police car runs her over.

Now, are we to say that because those officers were pursuing the perpetrator in good faith that the little old lady shouldn't have recovery. I think that's a monstrous result. It doesn't make any difference whether an officer is acting in good faith or bad faith, if, in his actions he injures someone. And I think the same point applies if Federal officers injure someone's constitutional rights.

The good faith defense is, of course, important to protect those officers from individual liability. But if we're going to substitute the United States so that the cost of the injury is distributed over the entire population, then the good faith defense doesn't make much sense.

Furthermore, as I understand the administration's position, they want this legislation in order to spare Government officials of the burdens of litigation. But you see, under Mr. Schmults' approach, those Government officials are going to be in there to try to prove their good faith defense so that the United States can escape liability. So the individual is going to spend as much time with lawyers, they're going to spend as much time in court. To be sure, they will not be subject to the risks of financial liability, but this purported fear and trembling at the possibility that they have been found to do something wrong is still going to be present, and it seems to me that a lot of the advantages that the administration claims to distill are, in fact, illusory.

I would also disagree with Mr. Schmults on the impact that this legislation is likely to have on litigation. I think it is plain that if the United States is liable, more people are going to be inspired to bring these sorts of suits than is presently the case.

It is true that it is not easy to recover in a *Bivens* case and I think that that has something to do with the fact that there are not more of these cases. If the United States is the defendant with its financial resources, I would suspect that we will see the development of a much larger bar litigating constitutional court case and so I would question whether this statute, in fact, is going to have the minimal litigation impact that the Government suggests.

Finally, as I noted at the opening of my statement, we are concerned about the problem of the good faith defendant who gets embroiled in one of these cases and we would also like to see an opportunity for more handsome recovery. But we, unfortunately, conclude, however, that this bill is not the way to do it.

We have suggested one alternative would be to provide under legislation that the United States can be impleaded as a third party defendant in a case against an individual and I think that drawing on common law agency principles, such a legislative approach could be perfected so that if it is found that the individual defendant acted in good faith, then liability would exceed to the United States, which would be wholly proper; the good faith defendant would not be held liable for money damages, but the injured party could recover.

If, on the other hand, the individual officer acted unconstitutionally or otherwise outside the scope of his employment or the orders from his superior, then it would be proper that he should be held liable. Some officer, off on a lark performing illegal actions, should not be indemnified by the United States. That's not the kind of cost and the kind of risk that should be distributed across the broad base of taxpayers.

Another alternative would be the one that's followed at the State and local level, which is to provide insurance coverage in such a way that there are incentives for not acting improperly, somewhat like Allstate Insurance Co., we can protect safe drivers better. That's another possibility and I think study of arrangements that have been made at the State and local level might be illuminating.

This is not to say that impleader or insurance coverage are the only alternatives or the only avenues to solve this problem. There may indeed be others. The problem is not insoluble, but we think this cumbersome amendment to the Tort Claims Act, which eliminates elements that have been recognized now as constitutionally required, is not the proper way to approach the problem.

Thank you, sir.

Senator **Grassley**. First of all, since you have opposition to the bill, if you would like to sit down with me and/or my staff as we work on this legislation, we would be very happy to do it and welcome the opportunity.

Mr. **Lynch**. Thank you. And I would like to point out in that regard that over the past 4 years when similar legislation was introduced in both the previous Congresses we did engage in extensive discussions with the staff, relevant committees and with the administration, particularly in trying to develop a more meaningful disciplinary system.

The disciplinary provision in this bill is wholly inadequate. It leaves it completely to the discretion of the bureaucrat. It's a trust-bust approach to discipline and we are doubtful at this point whether the administration really wants to go through the process that the last administration went through to try to develop a meaningful disciplinary system. If they are, we would certainly welcome that opportunity. But we have our doubts and we don't think that the disciplinary provision that they have put forward now indicates a meaningful first step toward achieving a realistic and effective disciplinary system. But we are very open to that and have worked very hard on this in the past.

Senator **Grassley**. I would like to say for the record that my understanding of the Supreme Court decisions in this area in past cases differ somewhat from yours. As an example, in the *Carlson* v. *Green* case, the Court stated that the *Bivens* case established that the victims of a constitutional violation by a Federal agent have a right to recover damages against the official in Federal courts despite the absence of any statute conferring such a right.

Immediately following that statement, the Court stated, and I quote, "Such a cause of action may be defeated in a particular case, however in two situations. The first is when defendants demonstrate special factors counseling hesitation in the absence of affirmative action by the Congress. The second is when defendants show that the Congress has provided an alternative remedy which explicitly declared to be substitute for recovery directly under the Constitution and viewed as equally effective," unquote.

This case suggests to me that the Supreme Court does not, indeed, base its inquiry on whether Congress has created what it views as an equally effective remedial scheme. This legislation does that and, of course, that's where we differ.

But this legislation is, as I've suggested to you in a willingness to sit down and visit with you, not written in stone, and again, I would welcome any opportunity that you want to take to do that.

Mr. **Lynch**. On that score, Senator, I would just like it to be clear that our position is not—we would be whistling in the wind if it were—that Congress cannot legislate a substitute. Clearly, it can. But the tough question is whether the substitute is equally effective. And just to recapitulate, in the absence of punitive damages, jury trial and effective deterrents, the substitute is not equally effective. That's the key inquiry.

Senator **Grassley**. I have no specific questions that I wanted to ask you so I thank you very much for your testimony.

Mr. **Lynch**. Thank you, Senator.

[The prepared statement of Professor Neuborne, submitted by Mr. Lynch, follows:]

PREPARED STATEMENT OF PROF. BURT NEUBORNE

Mr. Chairman and members of the Subcommittee:

Thank you for the opportunity to present the views of the American Civil Liberties Union on the constitutionality and wisdom of S. 1775. As a Professor of Law at New York University and an active constitutional lawyer, I am deeply concerned over a number of bills pending before this Congress which threaten the integrity of the Federal court system by seeking to deprive it of the power to grant effective remedies in constitutional cases. Instead of relying on the Supreme Court to strike a proper remedial balance in constitutional cases, several bills pending before this Congress, including S. 1775 seek to invade the province of an independent judiciary by stripping Federal judges of the power to award remedies which are necessary to vindicate the constitutional rights of litigants. Such an assault on the remedial powers of the Federal judiciary constitutes a threat to the principle of separation of powers.

The basic element of a court's remedial armory is its power to order a wrongdoer to pay compensatory damages to his victim. Indeed, only when a damage remedy is demonstrably inadequate may a court resort to equitable relief. The Supreme Court has recognized that once Congress vests a Federal court with subject matter jurisdiction over a constitutional controversy, the Federal court possesses inherent power to use traditional remedial devices to enforce its decisions on the merits. E.g., Ex parte Young, 209 U.S. 123 (1908)(injunctive relief); Bivens v. Six Unknown Agents, 403 U.S. 388 (1971)(damages for Fourth Amendment violations); Davis v. Passman, 422 U.S. 228 (1979)(damages for Fifth Amendment violations); Carlson v. Green, 446 U.S. 14 (1980) damages for Eighth Amendment violations). While Congress may, of course, seek to substitute one form of relief for another where both are adequate, it may not seek to displace an adequate constitutional remedy with one which is plainly insufficient.

Congresses' power to regulate the remedial powers of an Article III judge, while broad, is subject to substantial constitutional constraints. Where the rights in question flow from non-constitutional sources, Congress, of course, possesses a virtually plenary power to define the appropriate remedies. However, since the substantive value of a right is inextricably intertwined with the remedies which exist to enforce it, when the source of a plaintiff's cause of action is constitutional, Congress may not strip the courts of traditional remedial mechanisms which the court deems necessary to the vindication of plaintiff's constitutional rights.

Once Congress vests an Article III court with subject matter jurisdiction involving a constitutional cause of action, it may not direct the court to decide the case a particular way. Only the judiciary may decide cases or controversies properly before it. E.g., United States v. Klein, 80 U.S. (13 Wall.) 128 (1871). If Congress may not dictate the outcome of a case within the subject matter jurisdiction of an Article III court directly, it may not achieve the same result indirectly by stripping the court of power to issue relief needed to implement its decision. Indeed, if Congress were permitted to strip a court of remedial power necessary to the implementation of its decison, Federal courts would be reduced to the role of issuing advisory opinions - in blatant violation of the Case or Controversy rules of Article III. Thus, when a traditional remedy is necessary to the implementation of a decision in a constitutional case properly within the subject matter jurisdiction of a Federal court, Congress may not deprive the court of the power to enforce its decision on the merits.

Congress, if it wishes, may seek to take the Federal courts out of the business of deciding cases involving certain illegal actions by Federal officials. Such a course of action would raise serious questions of policy and constitutionality. But, whatever the power to remove subject matter jurisdiction entirely, Congress may not vest an Article III court with subject matter jurisdiction over a given category of cases, and, at the same time, forbid the court from granting the traditional relief necessary to implement its judgment on the merits. Once Congress authorizes an Article III court to excercise subject matter jurisdiction over a case or controversy, Congress may not put its finger on the scales of justice by dictating the outcome directly, by enacting rules of decision; or indirectly, by denying the court power to enforce its decision.

Although disputes between Congress and the courts over the scope of remedial authority in constitutional cases have been rare, the Supreme Court has unequivocally upheld the power - and duty - of an Article III judge to provide those remedies required to implement his or her decisions on the merits. Thus, for example, in Jacobs v. United States, 209 U.S. 13 (1933), the Supreme Court ruled that Article III judges were empowered to award interest in cases arising under the Fifth Amendment despite the failure of the Tucker Act to grant them "jurisdiction" to do so.

The effect of S. 1775 is to preclude a Federal court from awarding compensatory and, if appropriate, punitive damages against a Federal official who has maliciously and knowingly violated a plaintiff's constitutional rights. In place of the traditional damage remedy, S. 1775 seeks to erect a cumbersome tort claims procedure which provides inadequate compensation and no deterrence whatsoever.

As the Supreme Court explicitly noted in Carlson v. Green, 446 U.S. 14 (1980), a Federal Tort Claims Act remedy is not an adequate "compensatory" substitute for a damage recovery against a wrongdoing official for at least two reasons.. First, a Bivens damage claim is triable, as a matter of constitutional right, to a jury. Where the Seventh Amendment guarantees a constitutional plaintiff access to a jury in determining the facts surrounding both liability and damages, Congress may not destroy that right by "substituting" an allegedly equivalent remedy which bars a plaintiff from access to a jury. Whatever the constitutionality of the Federal Tort Claims Act ban on jury trials, it may not be applied to frustrate the existence of a right to a jury trial under a wholly separable cause of action. cf. Byrd v. Blue Ridge Rural Electric Cooperative, Inc., 356 U.S. 525 (1958). (Federal jury trial rules apply in diversity cases because of strength of policy in favor of a jury). Dice v. Akron, Canton & Youngstown Rail-Road Co., 342 U.S. 359 (1952) (applying Federal jury trial rules in state FELA cases because of strength of policy in favor of jury trial).

Second, while punitive damages are available to a Bivens plaintiff, punitive damages may not be awarded in a Federal Tort Claims Act case. Given the difficulty of valuing constitutional rights, the combination or an artificially low liquidated damage formula, coupled with a ban on punitive damages and a ban on jury trials, deprives a constitutional plaintiff of the opportunity to recover meaningful awards against a wrongdoing official who may have wilfully violated his constitutional rights.

Moreover, as the Supreme Court noted in Carlson v. Green, 446 U.S. 14 (1980), a Federal Tort Claims Act remedy is not an adequate "deterrent" substitute for a damage remedy against a wrongdoing official for obvious reasons. As the Court ruled in Carlson:

> "...the Bivens remedy, in addition to compensating victims, serves a deterrent purpose. See, Butz v. Economou, 438 U.S. 478, 505 (1978). Because the Bivens remedy is recoverable against idividuals, it is a more effective deterrent than the FTCA remedy against the United States. It is almost axiomatic that the threat of damages has a deterrent effect ... surely particularly so when the individual official faces personal financial liability." 446 U.S. at

Since the so-called substitute remedy is patently inadequate from the standpoint of both compensation and deterrence, it falls below the constitutional minimum. Where Federal courts are vested with the responsibility to enforce the Constitution of the United States, Congress may not strip them of traditional remedial tools and seek to substitute a patently inadequate placebo.

Congress is not, however, without power to deal with the problem which S. 1775 seeks to solve. Federal officials who act in good faith and with reasonable cause to believe that their acts are lawful ought not bear the economic cost of a constitutional violation. Similarly, Federal officials performing acts which qualify for a degree of immunity should not be faced with possible damage awards. Both the good faith and immunity cases may be dealt with, not by imposing a blanket Tort Claims remedy which shields wilful wrongdoers from the economic consequences of their acts, but by the imposition of a selective procedure which would allow "good faith" officials to pass the ultimate economic cost to the government, while forcing "bad faith" officials to face the economic consequences of their wrongdoing. Such a selective procedure already exists in the form of Federal impleader. Were the Tort Claims Act amended to permit Bivens defendants to implead the United States, a self-executing mechanism would allocate the economic loss caused by a constitutional violation to the proper party. Bivens defendants who are entitled to a good faith defence or to a degree of immunity would be shielded if the United States consented to be impleaded. Bivens defendants who act in bad faith would be unable to succeed in impleading the United States and would, with justice, be forced to pay damages personally.

S. 1775 seeks to shoot a gnat with a cannon and succeeds only in wounding the courts and raising serious constitutional questions. An impleader remedy, on the other hand, would operate selectively to allocate loss in constitutional cases in a fair and equitable manner without weakening the enforcement power of the Federal courts.

Senator **Grassley**. Our next witness is a former U.S. attorney and current partner in the law firm Lisman & Lisman out of Burlington, Vt.

I have in hand a letter that Mr. O'Neill sent to Attorney General Smith prior to his leaving the Government. In that letter, you, Mr. O'Neill, expressed your concern with one case in particular in which you were involved in a representative capacity.

Mr. O'Neill, I'm going to take the liberty of quoting some of the passages in that letter and will also place the letter in the record.

With reference to this lawsuit, which was brought by a logger against 17 employees of the Forest Service, you stated in your letter to the Attorney General—

> In every instance in this case, the Government employees were acting in the course of their official duties. They were subjected to very real concerns for their personal assets because of their Government job.
>
> Even though the likelihood of recovery was not great, simply the bringing of this lawsuit caused these individuals significant anxiety. In addition, although these are all very conscientious individuals, one can easily see that they probably will not feel as strong a sense of duty in difficult future situations in view of the fact that they might be sued personally for action which they take.

Mr. O'Neill, I want to thank you. I think you put the matter very succinctly in your letter to the Attorney General, and we would certainly like to hear your thoughts on this legislation.

Would you please proceed? And as I stated before, if you want your whole statement put in the record and then summarize, I would encourage that.

Mr. **O'Neill**. I certainly would be pleased to do that. I will submit the entire written statement for the record and briefly summarize it.

STATEMENT OF JEROME F. O'NEILL, ATTORNEY, LISMAN & LISMAN, BURLINGTON, VT.

Mr. **O'Neill**. My experience, comes from having been with the U.S. Department of Justice in the U.S. attorney's office in Vermont in varying capacities for 8½ years so that I have a very good idea what agents and other employees go through when they are sued personally.

I wrote the letter which you have referred to never expecting to be sitting here or having it read into this record, because I felt it important to add one more voice to what I could see was a difficult problem which needed attention.

Federal employees, I think, are virtually unique in the mainstream of employees in this country due to the personal liability which they are subject to, for their actions taken on behalf of the Government. I cannot understate to you the devastating effect on a Government employee that a lawsuit against that individual personally has.

CASES WHICH ILLUSTRATE WHY THE LEGISLATION IS NEEDED

There are two particular cases which I have used as reference. You have alluded to one of them. I would like to briefly mention the second of the two cases, which involved an action against Federal and State law enforcement agents, the latter, of course, being covered by insurance. The Federal employees were sued for over $1 million and the named lead defendant in the case was a Federal agent. In my experience he was one of the best Federal agents in the country, and I say that after dealing with a lot of agents. He was eligible for retirement, and after that action was brought, you could see physically the effect the lawsuit had on him. He had a bad eye and you could see that eye twitch more—I mean that literally—after this action was brought. He retired 4 years earlier than he could have despite the fact that he thoroughly loved the job that he was doing. Of course, the irony is, that shortly after he retired, a U.S. district judge concluded that the plaintiff had failed to state a cause of action as to him. However, by then, it was far too late.

The second instance that I have specifically referred to—and these are, I am sure, representative of the instances where actions have been brought around the country—involved the logging case which you referred to. In that case, there was absolutely no question that the Government employees, in every instance, were acting within the scope of their duties and employment. Nevertheless, they were subjected to personal liability through having this action brought against them.

SUING THE GOVERNMENT MUST BE THE ONLY REMEDY

The logging case stands for a proposition which I think it is important to have in mind, because that in that instance the plaintiff had available to him a remedy under the Tucker Act for breach of contract had he wished to bring an action against the United States in the Court of Claims. Therefore, it is clear that legislation which simply provides someone with an alternative remedy is insufficient to protect employees personally. A suit against the United States alone must be their exclusive remedy. Otherwise, people, for rational or irrational reasons, may choose not to use it, but to sue the Government employees personally.

I have seen Government employees ask difficult and unpleasant questions after being told that they are going to have to be personally liable for any judgment entered. They question what is going to happen with their families, their houses, their children's education. They seriously wonder whether or not they should have been acting on behalf of the Government as conscientiously as they did.

GOVERNMENT EMPLOYEES ARE NOT DOING THEIR DUTY

I can tell you right now, literally, that there are Government employees who are not doing their duty. Perhaps not too many of them, but I do know of U.S. Customs inspectors who have been criticized by the people they work with for conducting legitimate searches on the theory of, "Why did you stick your neck out in that particular instance?"

The reason, Senator, is simple: The fact that those people are concerned that they will be sued personally. If they do not have a legitimate concern, I can see no reason why we should provide a crutch in that situation for them to rely upon and fail to do their duty.

I am also aware of criminal defense lawyers who use the personal liability of individual employees to remind them that if they are too aggressive, they can be personally sued. All of us know deep in our hearts, that when you tell someone that a certain percentage of the people will be affected by it and change their conduct to do less of a job than they should. Issues as to how an investigation is conducted are meant to be resolved at the supervisory levels, not by threatening someone with what will happen to him and the members of his family if you do not like what he does.

ANY POTENTIAL DETERRENT IS OUTWEIGHED BY THE HARDSHIP OF PERSONAL LIABILITY

The Government has available to it a wide range of civil and administrative remedies in addition to that which would be provided by the referral structure contained in the proposed legislation. We do not, I submit, need personal liability to get a deterrence to wrongful conduct. It may be that there is an argument, and I think with some legitimacy, that in a certain small percentage of cases that liability has a deterrent effect on wrongful personal conduct. The difficulty with this approach, however, it is that the number of cases which it applies to is so small that what we are doing is killing a gnat with a tank. It is absolutely out of proportion when we look at the very small number of instances where deterrence may have any value.

At present, the deterrence we have is deterring Federal employees from doing their own duty.

THE AGGRIEVED CITIZEN NEEDS THIS LEGISLATION

I also would add that I think this legislation is necessary not only from the point of view of the employee, but in the instances that have been referred to here today, in order to compensate people who actually have been injured and do have a right to some form of recovery.

I think that it is noteworthy that in the *Bivens* case, which has been referred to here, that in the end Mr. Bivens got a $300 settlement. He would have been far better off to have this legislation in effect. While it is fine to talk about the need for deterrence, I think that in the overall spectrum of things, that this legislation will make it much more equitable for people who have been injured because they will have a viable method of recovery.

The little old lady in the analogy you heard a few minutes ago would have no difficulty recovering to the full extent of her compensatory damages under the Federal Tort Claims Act. So, I think that illustrates again why that type of information is important.

CONFLICTS IN REPRESENTATION ARE ABOUT TO BECOME A MONUMENTAL PROBLEM

The likelihood is continually increasing that when an action is brought against a Federal employee or employees, that there will be a conflict with his employer or with other employees, making it impossible for the U.S. attorney to represent them all. I am amazed at the relatively small amount the Justice Department has paid out thus far for private counsel fees. In addition, the present state of the law has created a situation where the Government may be paying out—let's pick a figure—$50,000 in private counsel fees in a given case, but could settle the case for a tenth of that amount if it could pay itself. However, the money has to come from the individual, who cannot or will not pay. If the Government were a liability insurance carrier, it would go bankrupt using that type of theory and practice to settle claims.

THIS LEGISLATION IS CONSTITUTIONAL

I have read *Carlson* v. *Green* and I cannot agree with the reading of it which I have heard in here this morning. What is important, I submit, is that the Congress must have determined that considered the legislation an equally effective remedy. It does not necessarily mean that every "i" needs to be dotted in exactly the same way. The Federal Tort Claims Act is an analogous situation which is constitutional. In fact, for most people, this legislation would not only be equally as effective, it would be a much more effective remedy because it would give the injured individual the deep pocket of the Government to recover from.

THE PROPOSED LEGISLATION IS ABSOLUTELY NECESSARY

Senator, I would say simply this: The situation, as it presently stands, tears away at many Federal employees. I cannot tell you the anguish that I have seen in people when they find out that the Government they have labored so hard for will not protect them. They are absolutely amazed by the revelation. I think today, that if more Federal employees realized it, we would have a smaller number of dedicated Federal employees than we have.

We are safe at the moment because so few of them actually realize that they are personally liable. The effects on Government employees when they find it out are absolutely devastating.

As a citizen of this country, a taxpayer and a former Government employee, I implore you to pass this legislation because I think it is needed for all of the purposes that I have described.

That is the essence of my statement. I would be pleased to answer any questions which it may have raised, sir.

Senator **Grassley**. I have two or three questions, but I would like to say to you first of all, thank you for the experience that you bring from your past employment to our understanding of the need for this legislation.

You just recently heard the testimony from the ACLU. I would like to ask you what you think about their impleader or insurance suggestion.

Mr. **O'Neill**. The impleader suggestion is totally impractical, I would submit. We would be better off as a Government without any legislation than to go to an impleader situation. The main difficulty with the impleader situation is that what will occur then is that in virtually every instance, it will be necessary to have private counsel for each and every Federal employee who is sued. The reason is that a conflict will arise between the Governnment, which on the one hand, wishes to assert, and should assert, if it is to fully protect its own position, that the individual may have been acting in bad faith. The Government hardly can at the same time represent the individuals so you will have to have multiple counsel. I think that the incongruousness of the situation, where the Government, for its own protection and to defend itself must assert that the employee was acting in bad faith, is enough to make us realize that this is suggested legislation which should never be enacted. The impleader situation is totally impractical.

I likewise see the same types of problems with the insurance situation. I do not see any way that it meets the needs here under the circumstances.

Senator **Grassley**. What effect did these types of cases have on standard procedure in your office?

Mr. **O'Neill**. What they caused us to do was to put a highly disproportionate amount of time into these cases. When you are dealing with someones' personal liability, you cannot simply go out and settle the case as you might wish to do. So we would have to spend probably 3 or 4 times in terms of manhours and in terms of dollars and cents trying to deal with the cases as they were worth.

When we dealt with a Federal Tort Claims Act case, we could look at the case and determine what it was worth, consider the expense of trying the case and factor that into a settlement on it, as any private counsel will do in a tort situation. In the suits personally against employees we could not do that. In the cases which I am referring to, I would say that the Government probably spent close to $100,000 in those two cases when they could have been settled for $1,000 each. So the amount of dollars that needed to be spent in defending them, and the manhours, which takes away from other priorities, I think, is another reason why this legislation should be passed.

Senator **Grassley**. I would like to know your views on why we should allow the United States access to employee's good faith defense.

Mr. **O'Neill**. Well, I have given some thought to that and I have some mixed feelings with respect to it. But I think that it is a defense which is available to the Government and which there is no reason why the Government itself should give up. In addition, such an approach still subjects the particular employee to being placed in the case and, in effect, being tried, not for his personal dollars and cents liability, but having his reputation tried and his personal characteristics. Unlike what some people believe law enforcement officials are very concerned about their reputation and what people think of them overall in the performance of their duties.

So it seems to me, from my somewhat limited evaluation of that part of it, realistically, that I do think that it is important that the United States have that good faith defense equally available to it.

Senator **Grassley**. Thank you, Mr. O'Neill. We appreciate your taking the time to come and help us have a better understanding of this legislation.

Mr. **O'Neill**. Thank you, Senator.

[The prepared statement and other submissions of Mr. O'Neill follows:]

PREPARED STATEMENT OF JEROME F. O'NEILL

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE:

I am pleased to have been invited to testify before this subcommittee concerning the proposed amendments to the Federal Tort Claims Act which are contained in S. 1775.

I strongly believe that this legislation is necessary to protect the financial resources of federal employees for actions taken in the course of their employment; to provide those actually injured by "constitutional torts" with a practical remedy; to ensure that the Government does not lose the conscientious service of its employees because of fear of personal liability; and to save the Government and therefor the taxpayer the ever increasing expenditures in outside attorneys' fees which conflicts in representation of federal employees personally brings.

I would like to explain briefly why I have some knowledge and much interest in this subject. I now am an attorney in private practice in Burlington, Vermont, having left the Government on October 5 of this year. Prior to that I was, over a span of eight and one-half years, an Assistant U.S. Attorney, First Assistant U.S. Attorney and finally U.S. Attorney for the District of Vermont. I am from Vermont originally, having spent virtually all of my life there except for college, law school and military service. My father was a U.S. Immigration Officer and I worked for two summers as a U.S. Customs Inspector. This background, together with my friendship with many federal employees through the U.S. Attorney's Office, I believe has given me substantial experience from which to be able to discuss the proposed amendments.

The essence of my position is that federal employees are entitled to protection from personal financial worry or ruin for acts performed as part of their Governmental duties, and which this legislation gives them.

State and local government workers and workers for private enterprise are protected from personal ruin because of job related acts, or even concern about such ruin, through either liability insurance carried by their employer or the practical fact that lawyers go where they can recover--to the deep pocket of the employer. U.S. Government employees, incredibly, do not have the protection of a deep pocket behind them in a major area, constitutional torts.

My experience is that this failure of the Government to provide for its employees in this area is a cause of early retirement of productive Government employees, resignations from Government service, mediocre performance of duties and great personal anxiety. I cannot understate the devastating effect on a Government employee that a lawsuit against the employee personally can have. You cannot tell a law enforcement agent that he has nothing to be concerned about when he has been sued personally for over a million dollars for actions he took to lawfully enforce the laws of the United States.

I believe it would be helpful to illustrate the magnitude and significance of the problem if I briefly discuss two particular cases which I have been involved in.

The first case I am referring to involved eight federal law enforcement agents and six state and local police officers who were sued for $1,100,000 in connection with their attempts to locate and arrest an individual in a virtual no man's land where law enforcement officers had been shot at twice in the recent past. No one was injured in the attempt to locate the individual. Nevertheless, the suit alleged that various constitutional torts had been committed. The state and local officers were protected by insurance, but the federal employees had nothing to back them financially except their own resources.

The federal agent who was named as the principal defendant, for having organized the search and arrest procedures, visibly was upset by the lawsuit which followed. He was, in my opinion, one of the best federal agents in the country, having pursued investigations in Vermont which led to, among other things, the conviction of a man for violating the civil rights of a fifteen year old boy to prevent him from testifying against him, by murdering him, conviction of two New York organized crime figures, who never previously had been convicted, for bankruptcy fraud after they swindled Vermont farmers out of $400,000, and conviction of a man for kidnapping a woman who never was seen again after being enticed away by him. This latter individual murdered another woman while a fugitive from the Vermont federal charge. In none of these very limited examples did any other federal law enforcement officer see a federal crime to investigate initially. The agent's persistence and ability to analyze difficult factual situations literally made the difference and resulted in these convictions. These are only a sampling of his outstanding work. His tenacity, ability and accounting background gave him a combination of personal assets that made him invaluable to law enforcement in cases ranging from homicide to fraud and everything in between.

The lawsuit I have referred to precipated the agent's early retirement from federal service. He thoroughly enjoyed his work, and undoubtedly would have continued working until forced by the age limit to leave. The lawsuit had a demoralizing effect upon him however. Why should an agent eligible for retirement continue to run the risk of other situations arising which might result in lawsuits being brought against him. He chose not to continue to subject himself to personal liabilities for reasons that were difficult to dispute.

Ironically, shortly after the agent I have described retired, a U.S. District Judge held that the plaintiff's allegations, taken together with his own deposition, failed to state a cause of action against the agent and the case was dismissed as to him.

By then it was too late, however; the agent had retired.

The factual situation I just have set out illustrates graphically one specific instance we know of where the lack of adequate protection of Government employees has hurt the Government. High caliber law enforcement agents are prized everywhere, but in areas like Vermont where there are relatively few federal agents to begin with, the loss is particularly acute. The results actually are measurable in the drop in the quantity and quality of the cases produced for prosecution when an agent of high caliber leaves.

The second case which I believe is worth bringing to your attention pertained to a dispute arising over a logging contract on Government lands. Seventeen employees of the U.S. Forest Government and U.S. Department of Agriculture were sued personally, ranging from a technician who had almost no involvement, to the Secretary of Agriculture, who I do not believe had ever heard of the case before he was sued. The principal allegations were that constitutional torts had been committed in the taking of property without due process of law.

An amazing aspect of this case was that there was a remedy available, namely an action against the Government under the Tucker Act for breach of contract. Plaintiff's counsel, however, apparently had great visions of what a constitutional tort case would bring and ignored the Court of Claims, where he had a viable remedy if he could prove his case.

As is typical in these cases, in every single instance of conduct spread over four years by all seventeen of these individuals, there was not the slightest suggestion that any of them had acted outside the scope of his employment.

The utter amazement of these Government employees when they learned that the United States would not satisfy any judgment entered against them was a very unpleasant sight to be present for. We were faced with questions such as "Can this individual recover the cost of the education I'm giving my son in dental school?" "Could he force me to sell my property?" "What about my house?" "Can he garnish my salary?" None of the defendants felt that their conduct had in any way been wrong. Virtually all agreed that they would do exactly the same thing again except not bend over backwards as much as they had to help the individual who now was suing them. Nevertheless they seemed to wonder aloud whether their actions in protecting the Government's interests as strongly as they had were in their own best, personal interests. The question simply was why should they strongly and appropriately enforce the Government's rights when the Government would not support them when they were being sued for acting on behalf of the Government. That is a difficult question to answer. The most consciencous are not deterred. Those who are conscientious, but perhaps are more pragmatic, however, recognize that virtue in protecting someone else's interests has its limits, particularly when you are the one being sued.

In both of the instances that I am familiar with simply the pendency of the law suit caused the Government employees a great deal of personal anxiety. People were concerned about what personal decisions they should make and what effect it would have on their families. The effect of any lawsuit, even one involving an automobile accident where there is liability insurance, is an unpleasant one for the person being sued. When you have no protection financially, however, the psychological effects can be devastating. Unfortunately, some people are aware of the terrorizing effects which constitutional tort suits can have on Government employees and employ them as such.

Also, some criminal defense lawyers will remind aggressive federal agents that they are personally liable if they push too hard and a basis can be found for suing them. This type of tactic undoubtedly is successful against some agents who fear for their personal well being and thus back off the intensity of their investigation. The question of the intensity of an investigation should be raised with an agent's superiors; threat of a lawsuit personally against the agent should not determine how the agent conducts his investigation.

Even if the person sued is the least involved of the many defendants named in a lawsuit, it nevertheless becomes an unpleasant two or three years minimum wait while the lawsuit winds toward an end. Since one of the instances that I am familiar with actually could have been resolved by a suit against the Government itself, it is clear that simply giving people the option to sue the Government is not enough. That must be their only remedy.

In addition to the examples which I have referred to above, my close relationship with many federal employees in Vermont has made me aware that there are Government employees who now will not do their duties fully out of fear of being sued. Some of the conscientious employees are critized by other employees for taking appropriate steps to enforce the law. Some people have developed the attitude that there is no reason why, even if fully justified, they should fully exercise their legitimate Government authority to support the laws of the United States. The more actions they take in enforcing the law, the greater their chance of being sued. The attitude simply becomes, "Why should I stick my neck out." For some people their personal liability simply may be a crutch, but the last thing we as citizens of this country need is an excuse for Government employees to fail to appropriately enforce the law or otherwise do their duty.

Government employees, and law enforcement or law enforcement related officials such as Customs and Immigration Officers, frequently must work in gray areas. The Government has available to it a wide range of civil and administrative remedies which it may take against its own employees for wrongful action, and in a rare case in which it is appropriate, can institute criminal action. However, for the most part the actions for which Government employees are subjected to personal liability fall at most into the gray area. The lawsuits sometimes are buttressed by unprovable assertions with the mere fact that the allegations are made having the desired effect of influencing Governmental conduct. Often the bringing of these actions has been released to the press long before the filing stamp at the courthouse is dry. Justice is not sought, but rather personal or philosophical vindication.

Taxpayers correctly expect Government employees to do their jobs and do them well. The personal liability which Government employees are subjected to, however, severely undermines the confidence of public servants in their ability to appropriately do their jobs without being threatened with financial ruin for having done so.

I have not attempted to go into the area of convicted prisoners and their frequent use of the constitutional tort theory to sue federal law enforcement agents. When you are indigent, bored and incarcerated there is very little motive not to file some type of action for damages against those responsible for your incarceration. This likewise is an expanding problem which causes agents to wonder sometimes if it is worth it.

There are two other aspects pertaining to these amendments which I would like to discuss briefly. The first is that this legislation is necessary to afford those persons who actually have been injured by a constitutional tort with a practical remedy. Suits against federal employees rarely will be very productive since without insurance coverage, a deep pocket behind them, or the unusual monied federal employee, actual recoveries will be expensive and difficult.

The Federal Tort Claims Act recognizes that those who are injured have a right under many circumstances to be compensated. Those who actually have their constitutional rights infringed upon and who can show actual damages are entitled to relief and have as much of a right to this legislation as does the Government employee who needs the protection of it.

Lastly, I would like to point out that in reviewing the constitutional tort cases which I am familiar with, the likelihood for conflicts of interest arising between the employees themselves and also with the Government itself are great. I can forsee situations in which it will be absolutely necessary for each person who is sued to have their own attorney. This will arise because the interests of the Government itself often are not the same as those of the employees whom the Department of Justice is defending. The interests of the individual defendant likewise may be inconsistent. If the Government had found it necessary to hire individual counsel for each of the seventeen employees who were named in one of the actions which I referred to earlier, I believe that the cost for defending each individual's interests easily could have run to a minimum of $15,000 in attorneys' fees, deposition costs and travel. If the case had gone to trial, this easily could have been doubled. The cost of the Government of defending this case therefore could have been between $250,000 and $500,000. Ironically, if as in the Federal Tort Claims Act cases which I have been involved in, this cost could be considered as a factor in settlement, the case could have been settled for a tenth or less of those costs. The cost would be unavoidable without the proposed legislation, however, since the Justice Department must pay for the private counsel, but has no money to settle the actions at substantially less than the costs of the counsel fees. Any liability insurance carrier which had to operate under such strictures soon would be bankrupt.

I understand that the Department of Justice has had to spend approximately two million dollars in private attorneys' fees in this area since 1976, a figure which seems certain to increase geometrically as the Department's experience with the increasing numbers of these cases shows the internal conflicts inherent in trying to represent the interests of all parties through one attorney. The price of this program will rise substantially if this legislation is not enacted.

As a citizen of this country, a taxpayer, and a former Government employee, I strongly implore you to pass this necessary legislation.

In closing, I would like to quote briefly some language which I found in the October 13, 1981 testimony on this subject of the Deputy Attorney General, Edward C. Schmults, before the House Judiciary Sub-Committee on Administrative Law and Governmental Relations:

> I will emphasize once again that this legislative initiative offers a meaningful, obtainable remedy to a citizen who has suffered a constitutional deprivation. At the same time, it dispels a cloud of personal liability that currently hangs over almost every federal public servant. Through this legislation, the citizen can obtain redress and the public official can conscientiously perform his mission. The citizen, the Government and the public are all the beneficiaries.

That quotation states perfectly why this legislation is long overdue and should be enacted into law forthwith.

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ATTORNEY GENERAL
JUL 29 1981

Hon. William French Smith
Attorney General of the United States
Rm. 5111 Main Bldg.
Department of Justice
10th and Constitution Ave., N.W.
Washington, DC 20530

Re: Bivens Type Actions Against Government Employees In Their Personal Capacities

Dear General Smith:

This office recently has settled a case which brings up an issue which I consider to be of substantial urgency. The case, entitled Roy Durkee v. Robert Bergland, et al, involved a disgruntled logger who brought an action against 17 employees of the United States Forest Service and U.S. Department of Agriculture in their official as well as personal capacities for allegedly depriving him of due process of law in connection with two timber sales contracts. The allegations were substantial and demanded very large amounts of money. Since they were sued individually, each employee was liable in his personal capacity for any damages recovered. We were confident that as to most of the individuals that we would be able to obtain a directed verdict or at worst a judgment in their favor from a jury. Nevertheless, there were some individuals whom we felt might have some liability. We managed to settle the case by agreeing to drop an action by the United States seeking approximately $12,000 in damages for what we alleged to be Durkee's breach of contract arising out of the same facts.

An Assistant U.S. Attorney and I met with the defendants who were most involved, even though it meant travelling to the midwest to meet with them. The reason we made this specific effort was that although we had statements from them, we considered that meeting with them was very important to iron out the details of the case, but also to reassure them of our strong personal interest in the case. The concern expressed by those individuals for their personal liability was very great, as you would expect.

In every instance in this case the government employees were acting in the course of their official duties. At most they might be seen to have exercised poor judgment, although even that is doubtful. Nevertheless, they were subjected to very real concerns for their personal assets because of their Government jobs. Employees in the private sector are normally not subjected to such liability either because of insurance coverage or because of the willingness of the entity by whom they are employed to fulfill any judgment which may be entered against them for actions taken in the course of their duties. It seems patently unfair for Government employees in the situation these individuals found themselves in to be subjected to such potential personal liability.

Even though the likelihood of recovery was not great, simply the bringing of this lawsuit caused these individuals significant anxiety. In addition, although these are all very conscientious individuals, one can easily see that they probably will not feel as strong a sense of duty in difficult future situations in view of the fact that they might be sued personally for actions which they may take.

I recognize that this is an issue which is before the Congress, and which the Department has taken the position should be rectified. I am taking the time to write this letter however because I believe very strongly that the failure to enact such legislation has caused the Government to lose the effective enforcement of our laws by many Government employees who are concerned that they will be sued personally. I know this to be the case with many U.S. Customs inspectors. I also know very well an outstanding FBI agent who retired early after having been sued in his personal capacity. No recovery was had, but the anxiety was substantial.

I will be leaving the Government shortly and so have no personal stake in any legislation enacted. Nevertheless, I am very concerned that Government employees are being unfairly treated and are not doing their jobs as well as they should because of present law.

Sincerely yours,

Jerome F. O'Neill

JEROME F. O'NEILL
United States Attorney

JFO'N/jmw

MONDAY, JANUARY 18, 1982

Their Money's at Stake

The Suits That U.S. Aides Fear

By David Ranii

National Law Journal Staff Reporter

WASHINGTON — It's hard times for the federal government's two million employees and not only because their famed job security has vanished in the face of the Reagan administration's budget cuts.

Increasingly, federal officials are being slapped with lawsuits that they cannot afford to lose — because they must pay the judgments out of their own pockets.

More than 2,200 suits accusing individual government employees of violations of constitutional rights have been filed since 1971, when the U.S. Supreme Court opened the floodgates to such actions in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388. Justice Department officials say that *Bivens* suits — many of which name multiple defendants — are being filed at the rate of 60 per month.

The specter of financial ruin, government officials complain, is devastating to employee morale and productivity even though federal juries have awarded plaintiffs compensatory and punitive damages in only 12 instances. In fact, the officials say, many of the suits involve frivolous claims that are designed to harass the officials or impede a law enforcement investigation of the plaintiff.

Some groups, most notably the American Civil Liberties Union, contend that the personal accountability of federal employees acts as an effective deterrent against constitutional violations.

The administration, however, is backing legislation on Capitol Hill that would end individual liability by making the United States the exclusive defendant in all constitutional tort cases. The legislation would offer at least one advantage to plaintiffs: creation of a "deep pocket" defendant in place of government officials who are generally unable to pay substantial judgments.

Many federal officials are not even aware of their liability — until they or one of their colleagues are sued. "No other group is so openly exposed to liability," says John Lodge Euler, assistant director of the Torts Branch of the Department of Justice, which defends federal employees in court.

For example, Jerome F. O'Neill, a former U.S. attorney in Vermont, recalls that he once defended eight federal law enforcement agents against charges of constitutional violations in connection with an arrest. The $1.1 million suit also named six state and local police officers as defendants, but they, unlike the federal officials, were covered by insurance. As it turned out, there was only a minimal monetary judgment against one of the federal officials, according to Mr. O'Neill.

Under the Federal Tort Claims Act, the federal government assumes liability for most common law torts committed by an employee "acting within the scope of his office or employment." But the government retains its sovereign immunity against constitutional torts.

"It's not fair, it's not equitable, and it doesn't make any sense," says G. Jerry Shaw, president of the Senior Executives Association, a professional organization for senior government officials. "If an employee does something wrong, he should be disciplined or fired, but don't ruin him."

$200,000 Judgment

Financial ruin is unlikely but not impossible. Last fall, in the largest judgment yet against a federal officer, a federal jury in Baltimore imposed a $200,000 judgment against an Internal Revenue Service executive for alleged denial of due process in a property seizure. The government's post-trial motions in the case are pending. *Epps v. U.S.*, J-78-2373.

While all of them are framed in constitutional terms. *Bivens* suits have been filed over everything from wiretaps authorized by former President Nixon to alleged constitutional violations stemming from personnel decisions by a federal worker's supervisors.

Although the suits against Mr. Nixon and other officials in the upper echelon of the government receive most of the publicity, the majority of suits are against middle managers and law enforcement officials at all levels. Government lawyers say it is not unusual for suits to name dozens of defendants along the chain of command — even if some of them may not have been in office at the time of the violation.

"The list of defendants is frequently as large as the attorneys' imagination," says A. Melvin McDonald, U.S. attorney for Arizona.

A few categories of federal employees, such as medical personnel, motor vehicle operators, judges and prosecutors, have absolute immunity against civil actions either through legislation or judicial rulings. But the vast majority of federal workers were exposed to liability for violations of Fourth Amendment rights by the *Bivens* decision. And in subsequent rulings, the Supreme Court and lower federal courts have, in the words of Asst. Attorney General Edward C. Schmults, extended liability "to claims bottomed on virtually any constitutional infraction."

All federal employees do have qualified immunity, however, which means that they are not liable if they can prove they were acting reasonably and in good faith. That is a prime reason why monetary judgments against the employees are so rare.

"It's very difficult to beat that good faith defense," says Burt Neuborne, law professor at New York University. He adds, nevertheless, that the government's boast of about only 12 financial judgments is "less than compelling" because many *Bivens* suits seek equitable relief exclusively or in addition to money damages — and equitable relief is often granted.

Mr. Euler of the Justice Department says monetary judgments are few because the violations are few. Government employees, he says, "are not trying to violate anybody's rights. They are not being malicious. They are just trying to do their job as public servants the best way they know how. And, in doing so, they irritate and aggravate people with whom they deal . . . I think most of the suits are filed by people who want to get back at somebody for something."

Government lawyers also stress that there are some strategic reasons for filing *Bivens* suits that have little to do with winning the claim. In addition to hindering a law enforcement investigation, such suits can be employed effectively as a discovery tool.

'Likely to Be Frightened'

The low frequency of monetary judgments in *Bivens* actions may mask their importance for other reasons, too. Peter H. Schuck, a Yale law professor and former government administrator, says that the dozen money judgments against individuals "are more important than the numbers suggest. Officials are likely to hear about them and be frightened about them . . . I would expect some officials are becoming risk averse. They place a very high premium on avoiding even a small risk of personal catastrophe."

From the government's perspective, defending employees also creates complex litigation problems. Multiple defendants or the "best interests of the government" may create a conflict of interest that necessitates hiring private counsel at government expense. And settling the suits is out of the question because the defendant lacks the required resources or motivation.

Mr. O'Neill said that as a U.S. attorney he spent thousands of dollars to defend cases that "could have been settled for one-third or one-fourth of the expenses . . . But the government can't take that money and convert it into settlement fees," which must be paid by the defendant. Furthermore, "the defendant has no incentive to settle because the government is paying all the expenses."

Amending the Act

Some public interest attorneys expressed considerable skepticism about the government's portrayal of *Bivens* suits in Senate hearings last November regarding S.1775, an administration-backed bill that would amend the Federal Torts Claims Act to make the U.S. government exclusively liable for constitutional torts. (A somewhat similar bill in the House, H.R. 24, contains several provisions that the administration finds objectionable.)

Representatives from the Government Accountability Project (GAP) of the Institute for Policy Studies questioned the purported proliferation of frivolous lawsuits and labeled the government's description of the "cowed bureaucrat" a red herring. Thomas Devine, GAP legal director, said *Bivens* suits undoubtedly do have some impact on officials' actions "and we welcome that. We think that federal employees should exercise restraint in wielding their power. Certainly they shouldn't shoot from the hip . . . when the Constitution is in the line of fire."

Mark Lynch of the ACLU argued that the personal liability of officials can "reform not only an individual's conduct, but overall policy as well." Lawsuits against former Central Intelligence Agency officials involved in improper domestic surveillance helped foster regulatory restrictions on such activities, he said.

'Federal Impleader'

As an alternative to making the government exclusively liable for constitutional torts, the ACLU advocates a modified version of the good faith defense in conjunction with adoption of a "federal impleader" system making the government a third party to such lawsuits. The government would be exclusively liable for damages if the officials' actions were performed in good faith, but "bad faith" officials would remain personally liable. "Some officer off on a lark performing illegal actions should not be indemnified by the United States," said Mr. Lynch.

GAP and the ACLU are also concerned about numerous other provisions in the Senate bill, among them those that eliminate jury trials and punitive damages for the victims of constitutional torts, and permit the government to assert a good faith defense.

But it is the perceived lack of accountability under the bill that has drawn the most flak from organizations such as the American Bar Association and Ralph Nader's Public Citizen Litigation Group, even though these groups support — albeit reluctantly — the principle of substituting governmental liability for personal liability.

S.1775 provides that if a lawsuit produces a settlement or judgment paid by the United States, the attorney general must notify the head of the employee's agency, who is then to decide whether disciplinary action is also called for.

This is not an effective deterrent, said Alan Morrison of Public Citizen, because "violations of the constitutional rights of individuals have often . . . been the result of policies . . . ~~that~~ have come from the highest levels within ~~the~~ departments."

Senator **Grassley**. Our next witness is a district ranger for the Forest Service, who has undergone the experience of being sued personally for decisions he made in the course of his Federal employment.

Mr. Lehman, I thank you for coming. I understand that you were subjected to a possible liability of $148,000 in damage and that the jury did, in fact, return a verdict against you in the amount of $1,000 of compensatory damages and $216.50 in court costs.

From my understanding of your case, you took every precaution in carrying out your job. At any rate, the Supreme Court has remanded the appeal back to circuit court so there may be some changes to come.

I would like to have you proceed with your statement.

Mr. **Lehman**. Thank you, Senator. My statement is rather short so I will read it.

Senator **Grassley**. Before you begin, do you have any members of your family you would like to introduce or anything? Do you have anybody here with you?

Mr. **Lehman**. My wife has accompanied me to Washington.

Senator **Grassley**. Your wife. OK.

Mr. **Lehman**. Yes, my wife Evelyn.

STATEMENT OF ROBERT C. LEHMAN, DISTRICT RANGER, FOREST SERVICE, U.S. DEPARTMENT OF AGRICULTURE, AVERY, IDAHO

Mr. **Lehman**. Since we started off so informally, I might just say that I am here far removed from my natural and loved environment, but I'm quite honored to sit before you today, Senator.

My name is Robert Lehman and I am a district ranger with the Forest Service and I will proceed with my statement and give you plenty of time for questions.

Senator **Grassley**. Thank you.

Mr. **Lehman**. Like I said, I am a ranger in the Forest Service in the U.S. Department of Agriculture. As District Ranger, I am responsible for the administration of 360,000 acres of public land on the Red Ives Ranger District of the Idaho Panhandle National Forest. My statement today involves my personal experience as a Federal employee who has been adversely affected by a court-imposed constitutional tort.

It begins back in 1967 when an unpatented mining claim on the National Forest lands was leased to a company called Continental Rare Metals, who contracted with Mr. E. B. Weiss to construct a dredge for mining operations.

Upon the expiration of the lease, Continental did not remove its equipment and by terms of the lease, it reverted back to the mining claimants.

All of the usable machinery were supposedly removed in 1968 by the claimants. The remaining abandoned waste consisted of garbage, bus bodies which had been smashed and stripped, and scrap metal. When I asked, the claimants and their associates disclaimed any ownership in the remaining debris.

In 1973, at the direction of my supervisor, I prepared plans for the inactive, unpatented mining claim site under the authority of the Solid Waste Disposal Act. The mining claim site was adjacent to the St. Joe River, which at the time was under study for possible inclusion in the Wild and Scenic Rivers System and has since been designated as part of the system by Congress.

Prior to implementing the cleanup plans, notice of intent was provided to the claimants; however, Mr. Weiss was not personally notified as I was unaware of a verbal agreement which Mr. Weiss claims transferred the remaining material to him.

In May of 1973, Forest Service employees under my direction, and with the knowledge and consent of my supervisor, buried and removed most of the remaining scrap metal from the claim and closed the access road to the site.

Two years later, out of the blue, a U.S. marshal knocked on my door and presented me with a summons. I was being sued for my actions in removing and cleaning up the claim site, to the tune of $48,000 compensatory damage and $100,000 punitive damages. At first this was incomprehensible, but as the shock wore off, the seriousness of the matter began to wear on me. The amount of the suit was unreal and the potential was there to wipe out my total assets plus my future.

The lawsuit resulted in a significant time impact on me. For the next 3 years, I had to devote considerable time and thought to the preparation of depositions and answering interrogatories. Finally, in July of 1977, we moved for summary judgment. The plaintiff filed a cross-motion for a partial summary judgment. The district court ruled that it had jurisdiction and the case was tried by the jury in June of 1978. The jury found against me and awarded $1,000 compensatory damages plus $216.50 court costs to Mr. Weiss. The next step was to appeal the judgment. The appeal was argued in the ninth circuit court in November of 1980. The circuit court upheld the lower court's decision and the appeal was then taken to the Supreme Court in 1981, which remanded the appeal back to the Ninth Circuit Court, and presently the parties are filing briefs for the court of appeals which will then rule on it.

The unsettled suit has been an ominous cloud over my personal and financial situation for over 8 years. Even worse than the possible financial damage, is the uneasy feeling I get each time that I make a decision.

I have forced myself to cope with this situation so that I can carry on my duties and responsibilities as a Federal manager, but it has not been easy. Litigation of the type I have experienced cannot help but affect decisions by me and other Forest Service employees close to the case.

In the case that I have just described, the plaintiff is still operating on the Red Ives Ranger District. Each year I am faced with several decisions regarding his business operations on the Forest.

One of the greatest anxieties in my case was the uncertainty at various points of wondering if the Government would continue to pay for the counsel who represented me or whether I might be forced to retain a private attorney.

In closing, I would like to emphasize that decisionmaking in the public arena is tough enough without our management folks at various levels of the organization being exposed to petty and nuisance lawsuits for decisions made clearly in the line of duty and in the public's interest.

Mr. Chairman, this concludes my statement and I would be happy to respond to any questions that you have.

Senator **Grassley**. Thank you very much.

Could I start out by asking how long you've been in the Forest Service?

Mr. **Lehman**. I have been with the Forest Service 30 years.

Senator **Grassley**. Could you go into any more detail than what you have already about how this kind of even today affects how you perform your job and how the lawsuit has influenced decision-making, or maybe just let me say, your daily work habits?

Mr. **Lehman**. Yes, I would like to say that there are many decisions to be made each day in the management of the forest.

Senator **Grassley**. Would you say that this lawsuit causes you to think about almost any decision you make?

Mr. **Lehman**. It certainly does, and it did even more so when the possibility of the settlement was $148,000. When I got the judgment of $1,000, it was livable, you might say, but the $148,000 had the potential for destroying me, affected every decision because, if I was sued over what was a very simple decision that was favorable with all of the public inputs that I had plus internal inputs—if I was getting sued over one that I was receiving favorable comments on, what is the potential on these where I know there's conflict and I know I'm getting brickbats thrown at me.

Does this answer your question, Senator?

Senator **Grassley**. Yes.

What effect did this suit, if any, have on your family? Do you have children?

Mr. **Lehman**. We have three children that are grown now who were in their teens during the beginning of this and it has had effect on the entire family and has indirect effects that I didn't list in my testimony, such as if I had been seeking credit or seeking a mortgage this suit would have been a liability. I have not done this during this 8½ years so I have not listed this potential liability as a credit reference.

I might say to answer that better that originally in this case there were two defendants and Mr. Wayne LaRue was sued along with me. I feel that I had the personality and patience to cope with this, but my codefendant, Wayne LaRue, took an early retirement and very rapidly developed the attitude, "Why should I work and save if I'm going to lose it in something like this?" The codefendant in this case suffered much more visible trauma than I did in the case.

Senator **Grassley**. Have you had any problems securing credit since the judgment was entered against you?

Mr. **Lehman**. I have not applied for any, but I'm sure that this is something that is asked by creditors when seeking mortgages and credits.

Senator **Grassley**. What's the impact that this suit or judgment against you, or the suit generally, has had on coworkers? For instance, could you give us some common comments that you may hear your coworkers make as a result of what has happened to you—or in any other way that you might want to generalize?

Mr. **Lehman**. Just the keeping of my self-confidence with a suit like this hanging over my head has been a constant struggle for me and my subordinates, they have an uneasy feeling sometimes if I'm directing them to do something, when here, I had directed them to do something that turned out I got sued over. So, it takes an extra effort on my part to maintain my leadership on the ranger district with subordinates.

With my peers in other districts, they are very interested in what I am doing and are watching this case as it affects decisions they must make. They know that I was sued over a relatively easy decision that I had to make and even though they have not been sued, they are uncomfortable with the thought of being sued over a decision that was so simple and in the line of duty and in the public's interest.

Senator GRASSLEY. Could you in some way tell us to what extent you went through checking with superiors and people around you the manner in which you should dispose and how you should go, and whether or not you should dispose of the property?

Mr. LEHMAN. Yes, I would be glad to. If you remember in my testimony, I said this started in 1967 and I came on to the District in 1972. So, the first thing I did was to arrive at the obvious decision after viewing this junk, that something should be done and I was getting inputs from my superiors that something should be done.

The first thing I did was review all of the procedures that my predecessor had gone through. And he had gone through all of the hoops of contacting the people involved, posting that the project would be done, and I went through these again, and I think it came up earlier today—one statement that was made is that sometimes there's an ax to grind between two individuals. I would like to add to that, that oftentimes I feel in the Government it's not necessarily an individual, it's an ax to grind against a position, in this case a district ranger—we had changed rangers in the interim, and if there was any of this axe grinding, it's not necessarily between two individuals, but between an individual and a position.

But we went through all the hoops of trying to locate the owners. And of course, my first interest was to get the person responsible to clean it up. Why clean it up with Federal funds when somebody left that garbage on the national forest? This was the first approach I took, to find the responsible individual. Well, now that I've found the individual, I am so tied up in this case that I can't get the rest of it removed. We surely didn't remove all the junk. All that we removed was the unsightly, truly garbage-type material from the site.

Senator GRASSLEY. Thank you very much, Mr. Lehman. We appreciate you and your family coming out here to testify and giving us your point of view on this legislation.

Mr. LEHMAN. Thank you.

Senator GRASSLEY. Our next two witnesses are both current U.S. attorneys. Mr. John S. Martin is the U.S. attorney, for the Southern District of New York. Mr. Martin, I will tell you that your entire statement will be placed in the record, and if you want to, feel free to summarize.

STATEMENT OF JOHN S. MARTIN, JR., U.S. ATTORNEY, SOUTHERN DISTRICT OF NEW YORK

Mr. **Martin**. Thank you, Mr. Chairman. I certainly will summarize rather than read the entire statement. Indeed, the last witness made more poignantly than I could, the plight of those Federal employees who are being sued in their individual capacities.

As my statement indicates, I have had experience with *Bivens* types of actions first as an attorney in private practice, where I was retained by Federal agents being sued in their individual capacities when they were told that the Government would not represent them.

This is a terribly demoralizing experience for a Federal agent who has—in both of the cases in which I was involved, the agents had been carrying out the explicit orders of their superiors in the conduct which gave rise to the litigation.

They found it very difficult at that point to understand why it was that the Government had abandoned them and would no longer represent them. I think it really did have a demoralizing effect on them, at least in one case. They have both since retired from the bureau. Whether that advanced their retirement, it's hard to say, but I think it may well have.

In other instances, as U.S. attorney in the Southern District of New York, I am presently representing 160-odd different Federal employees, all of whom we are forced to send a representation letter very much in the form that the one that is attached to my statement, in which we indicate to the agent the limits of the representation that will be provided to him. I have received those letters myself because I have personally been sued now at least twice since I've been U.S. attorney. And even knowing all this, it still is somewhat demoralizing to see all of those limitations that are contained in the representation. The agent is told that we cannot sue the United States, we cannot take positions inconsistent with the views of the United States and they are told that we cannot implead any other Federal official. So, an agent acting under orders, carries out the orders and is sued and finds himself in the position where the person who gave him the orders is not in the lawsuit and he can do nothing to bring that person into the lawsuit.

This creates morale problems. The problems also arise because in many of these cases, the search and seizure-type cases and other cases as well, very often the Government has considerations that make you take actions which are beyond the considerations in the normal lawsuit.

For example, questions of privilege. The Government may want to assert a privilege rather than expose certain information that could provide a complete good faith defense to the agent. The agent is somewhat demoralized when he realizes that there is some defense available to him which the Government is not going to assert. He sees his house going and his college education for his children, all that money going to satisfy a judgment because the Government won't put on the table all of the information that he knew of at the time he took his action.

So, I think that this legislation is really necessary to cure some of these problems. Also, this legislation will save a substantial expense. As the Deputy Attorney General pointed out, not the money spent on private counsel—as a beneficiary of that at one point in the past, I suppose I should not object to paying private counsel. But I would also point out in that regard that in some sense, even then, when the Government is paying private counsel, the agents find themselves somewhat second-class citizens. At least when I left private practice, I think the Government was paying at a rate of $75 an hour, which in some parts of the country might seem like a tremendous amount of money for lawyers. At the same time, I was charging private clients in private practice $150 an hour.

The agents knew that in New York at least that when they went out to get counsel they would have to have counsel take the case because the counsel had some public interest in the litigation. Their counsel was not being paid the same as the counsel might be if it was a privately retained matter.

But this expense is only part of the expense that these suits generate. In my testimony, I referred to the fact that we represent now 42 FBI agents being sued in one lawsuit. The amount of time that has gone into explaining to those agents—A, getting all the facts to make sure we could represent them and in explaining to them the limits on our representation has been fantastic. We've probably spent several months of the time of the attorneys in my office just working out these representation problems.

And I should add there is another problem because now the attorneys in my office are beginning to express concern. They have said,

> Look. There are conflict problems. We cannot provide to these agents we will represent, the full scope of representation they might obtain from private counsel. What is our personal liability as lawyers if we represent these individuals in a more limited way than they could obtain representation in private practice? Are we liable to be sued at some point down the line for legal malpractice?

So, you're going to create another level of problem on top of the already existing problems, I think, somewhere in the near future, where Government attorneys are going to be sued by people, individual agents, they represent if a judgment comes down against the agent.

Finally, and briefly, I join with what the Deputy and the other witnesses have said about the good faith defense. I think it is entirely appropriate for the Government to have the right to the good faith defense in constitutional torts. It seems to me what you're saying is, is the agent's conduct wrong at the time that he took it? It seems to me if the agent acted in a good faith belief that the search that he was conducting was constitutional, his conduct was not wrong and no one should be liable for that action.

That's all I would say, absent some specific questions.

Senator **Grassley**. Again, for the record, as I asked one other previous witness, do you feel that the efforts, expended in defending 42 FBI agents who were sued in connection with a raid that you refer to in your testimony, diverts the manpower in your office to any noticeable degree?

Mr. **Martin**. Certainly, it takes away several months of time from defending the specific action or defending other actions against the United States or bringing affirmative actions. It takes several months of time away just to deal with the question of representation of these individual agents. So, obviously, there is a great deal of wasted time—wasted is the wrong word—time that would be saved if we had the bill as proposed.

Senator GRASSLEY. How would the passage of this legislation ease this problem? Be as exact as you can.

Mr. MARTIN. Well, the way it would ease the problem is that it would take out—when you have individuals who are sued, you have to sit down with each individual, explain to him the scope of his liability, the type of representation you could provide and get into a greater factual analysis of his individual role in the case than you would have to do if the only defendant was the United States.

Therefore, you would save substantial time if you did not have all of these individuals being sued, the time that is spent counselling them as individual defendants, as opposed to coming up with a strategy for the United States to defend a particular lawsuit.

Senator GRASSLEY. Do you have any malpractice insurance that relates to this?

Mr. MARTIN. No, I don't, although it may be necessary to do that in the future.

Fortunately, on the criminal side, we basically have an absolute immunity defense for the actions we take. However, on the civil side, we don't have that and it may well be that we could be subject to liability by the people we represent in their individual capacities.

Senator GRASSLEY. Is malpractice insurance available for U.S. Attorneys?

Mr. MARTIN. I don't know that it is at this point in time. I have heard that there is an insurance company that is getting malpractice insurance for judges that is starting out so I'm sure that we could probably find a company willing to write a policy for us at some point in the future.

Senator GRASSLEY. Is your family in the audience? Would you like to introduce them to us?

Mr. MARTIN. The rather large crowd that recently entered, Senator.

Senator, my wife Peggy, and my four children, John, Kate, Meggan and Anne are all sitting in the back there.

Senator GRASSLEY. I hope you're all very proud of your Daddy and your Mother.

Thank you very much for your testimony.

Mr. MARTIN. Thank you, Senator.

[The prepared statement and letter submitted by Mr. Martin follow:]

PREPARED STATEMENT OF JOHN S. MARTIN, JR.

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE:

I am pleased to have been asked to testify to support the concept of an amendment to the Tort Claims Act which would make the Government liable for constitutional torts and the exclusive defendant in all torts suits involving Government employees acting within the scope of their employment. I have represented federal agents in such actions both as an attorney in private practice and as the United States Attorney in the Southern District of New York.

While in private practice, I represented agents of the Federal Bureau of Investigation in two separate actions, one brought by the Socialist Workers Party and one brought by members of the Jewish Defense League. In both of these instances the conduct giving rise to the lawsuit had been carried out under the direction of more senior officials of the FBI. In another instance I represented two agents of the Drug Enforcement Administration who were sued by an individual shot in the course of an arrest that was the result of a mistaken identification.

As United States Attorney, my office has represented numerous federal agents sued for conduct carried out in the course of their official duties. For example, my office now represents the forty-two FBI agents who have been sued in connection with a raid on an apartment at 92 Morningside Avenue in Manhattan in an attempt to capture a well-known fugitive, Joanne Chesimard.

From my experience, I can attest to the serious morale problems and needless expense that results when individual agents are sued in such action.

If as in the Socialist Workers Party and Jewish Defense League cases, the Government takes the position that there is a substantial conflict that precludes the United

States Attorney from representing the agents, those agents feel that they have been abandoned. Even though the Government agrees to pay for the private counsel, these agents cannot understand why the Government refuses to represent them in a lawsuit relating to acts they performed under the orders of their superiors.

Similarly, agents who find themselves sued in complaints which seek hundreds of thousands of dollars in damages feel that they are being treated with something less than full justice when they learn that while they will be represented by Government attorneys, the attorneys' first obligation is to the United States and the agents' interest must come second.

I would like to submit to the Committee a copy of the recent representation letter which we sent to the agents named in the suit arising from the raid at 92 Morningside Avenue and in which we set forth the limits of the representation we could provide to them. I think if you read this letter from the point of view of the agent receiving it, you can appreciate the problems of morale that such a letter creates. These problems are exacerbated in many situations where the reasonableness of the agents' actions can best be demonstrated by reference to confidential information within the Government's files. In many instances the Government may prefer to take the risk of losing a substantial judgment rather than disclosing confidential information that could justify the agents' action. An agent who pictures his life savings being wiped out, if a substantial judgment is awarded against him, will be seriously disheartened if he learns that the Government is refusing to release information which would provide him with a complete defense.

In my view, the proposed legislation would solve these problems and would have the additional benefit of saving the Government substantial amounts of money in legal fees. Not only would the Government save the money that is being paid to outside counsel in cases where federal employees have been authorized to retain private counsel at Government expense, but the Government would also save a considerable amount of time of its own attorneys in cases in which we do represent individual agents. For example, in the case involving the attempt to arrest Joanne Chesimard, literally months of the time of attorneys in my office has been expended researching the facts and the law to determine whether we could legally and ethically represent the individual agents and conferring with those agents to explain to them the possible conflicts of interest in such a representation. All of these problems would have been avoided had the proposed statute been in effect.

Finally, I would like to comment briefly on the suggestion that the Government not be allowed to assert as a defense the agents' reasonable good-faith belief in the lawfulness of his conduct. In the area of constitutional torts, particularly those arising under the Fourth Amendment, the question whether an agent's conduct is constitutional is often far from clear. As you all know, in many cases the Justices of the Supreme Court will be divided 5 to 4 on the question whether a particular search and seizure was constitutional. In such situations there does not appear to be any justification for depriving the United States, in a civil action, of the defense that the agent involved reasonably believed his conduct met constitutional standards.

U.S. Department of Justice

United States Attorney
Southern District of New York

SDD:cem

One St. Andrew's Plaza
New York, New York 10007

September 14, 1981

Special Agent
Federal Bureau of Investigation

Re: Adelona v. Webster, et al.,
81 Civ. 0373 (LWP)

Dear Special Agent:

Your request for representation by a government attorney in the above-captioned action has been granted by the Department of Justice, and the United States Attorney for the Southern District of New York has been authorized to represent you. As you will see from the complaint, a copy of which is enclosed, this case arises out of events at the apartment building at 92 Morningside Avenue in New York City on April 18 and 19, 1980. The plaintiffs, all of whom reside at that address, are seeking judgments of money damages against FBI agents and others who participated in the events in question based on allegedly illegal entries into certain apartments and other allegedly unlawful activities.

The purpose of this letter is to provide you with some general information about the case and the nature of representation by this office. This form letter (for which we apologize but which is necessary due to the number of Agents involved) contains information which is applicable to all potential Agent defendants; we will follow up this letter with group and/or individual meetings as necessary to discuss specific aspects of the case which may be relevant to certain of you and to answer any questions you may have.

In addition to FBI agents, such as yourself, the defendants include Director Webster, New York City police officers, and the City of New York. At this time, the only federal defendant actually served with the complaint and thus formally in the case is Director Webster, whom we are representing and who, like all Agents, is sued in both his individual and official capacities. We believe the complaint will soon be amended to name the United States as an additional defendant.

After the complaint was filed, the plaintiffs filed administrative claims against the United States under the Federal Tort Claims Act. Thereafter, an offer to compromise those claims was made, but it was unanimously rejected by the plaintiffs without the possibility of further negotiation. Counsel for plaintiffs has explicitly stated to the undersigned that the plaintiffs wish to obtain punitive damages from the individuals who were involved in the events in question, and punitive damages cannot be recovered from the United States. Because plaintiffs have taken this position, the offer has been withdrawn.

If the plaintiffs should prevail on any of their claims that FBI agents violated their constitutional rights, the Court could enter judgments against all federal defendants for compensatory damages and against the individuals only for punitive damages. The judgments for punitive damages would be enforceable against the personal assets of the individuals held liable, since there is no provision for indemnification or reimbursement by the government or any of its agencies for any such judgments.

The legal representation provided by the Department of Justice to federal employees sued in their individual capacities differs in certain respects from legal representation in the private sector. This is so because the principal obligation of every United States Attorney is to represent the interests of the government, and positions contrary to the interests of the government will not be asserted in court. The term "interests of the government" is, of necessity, impossible to define in advance, and the determination of what is in the interest of the government will be made by us, in conjunction with attorneys from the Department of Justice, as specific issues arise in the case. We are enclosing for your review a copy of the current guidelines applicable to the representation of government employees.

Two matters which have already been determined in this case may be illustrative of the effect of the guidelines. First, we are precluded from raising any argument against the validity of any governmental privilege, regardless of whether disclosure of privileged information might advance the interests of an individual defendant. However, such privileges may be waived in appropriate circumstances. Second, no third-party or cross complaints against any individual or the government will be filed by or at the expense of the Department of Justice. Thus, under certain circumstances, the representation we provide to federal employees sued in their individual capacities may not include pursuit of certain strategies which might be considered or advanced by private counsel. On the other hand, we will fully represent, within the above contraints, employees sued individually and will assert all legal positions appropriate to the defense of the individuals, as well as the government.

You are of course free to retain a private attorney to represent you in this case, and the United States Magistrate supervising the pretrial phase of this case has directed us to advise you that a decision must be made about who will represent you no latter than October 1, 1981. If you choose initially to have us represent you, you may later retain private counsel (with the court's approval), and we will fully cooperate with that attorney to insure a smooth transition in representation. However, you must pay for the attorney yourself; although in certain circumstances the Department of Justice will pay for outside counsel to represent individuals, these circumstances are not, to date, present in this case.

The information contained in this letter is not meant to alarm you unduly about this case or to imply that you make any particular decision about representation. Department of Justice guidelines now require that this type of disclosure be made to every federal employee whose request for representation by a Department of Justice attorney has been granted. You should understand that our office is commited to vigorously defending this action on behalf of the government, Director Webster, and others personally named as defendants.

I look forward to discussing the case with you after you have had a chance to review this letter. As mentioned, we will try to arrange a group meeting at the New York Office and follow that up with individual meetings as necessary. If and when you determine that this office will be representing you, please sign your copy of this letter as an acknowledgment of your receipt and understanding of the information contained herein and return it to the undersigned as soon as possible.

Thank you very much.

Very truly yours,

JOHN S. MARTIN, JR.
United States Attorney for the
Southern District of New York

By: Stanley D. Davis
STANLEY D. DAVIS
Assistant United States Attorney
One St. Andrew's Plaza
New York, New York 10007
Telephone: (212) 791-1994
(FTS) 662-1994

Acknowledged: ______________________

Date: ______________________

Senator **Grassley**. If there is no objection, if I could call the next two witnesses up at the same time and listen to both testimonies before we ask questions.

My reason for doing that is because I just got a message that I might have a vote in 15 minutes and at least I would like to have the chance of hearing your testimony all at once.

Mr. **McDonald**. I think that Senator DeConcini, who is a member of the Judiciary Committee and from your home State will certainly be interested in your comments on this legislation and I'll make sure that he has a copy of your testimony so that he can study it in real detail. And I hope that you would be willing to talk to him about this legislation as well.

And also, Mr. Cummings, you represent the National Association of Former U.S. Attorneys, is that right?

Mr. **Cummings**. That's correct.

Senator **Grassley**. We have deliberately attempted to have a number of U.S. attorneys come to testify before us today because I think that they are in the best position to observe the practical effects of the current system. They have a firsthand view of what the Federal employees go through in suits of this nature. They know what kind of time and hence what kind of money is spent in defending these cases. They know the frustrations that a plaintiff feels in suing a defendant who simply does not have the resources to satisfy the plaintiff's claims.

So, I thank you, Mr. Cummings, for coming to represent your association, and I would like to have Mr. McDonald go first and then you and then I'll ask a few questions together.

Mr. **McDonald**. Thank you, Mr. Chairman. I am indeed honored to have the opportunity to appear here today and particularly gratified that you're the chairman of this subcommittee. I have some in-laws who reside in the State of Iowa and they're very firm supporters of you.

STATEMENT OF A. MELVIN McDONALD, U.S. ATTORNEY, DISTRICT OF ARIZONA, PHOENIX

Mr. **McDonald**. I would like to somewhat vary from the written materials that I have submitted today and primarily address some of the comments that have been raised in opposition by the American Civil Liberties Union.

I became the U.S. attorney in Arizona, 2 months ago and prior to that time I had been superior court judge in Phoenix. In fact, one of my claims to fame was being elected the same night with Justice O'Connor.

In Phoenix, Ariz., the Phoenix Police Department, the Maricopa County Sheriff's Department, the Arizona Department of Public Safety, and the Tucson Police Department, all have those agencies of government who have, in effect, implemented what we are seeking by this legislation.

These departments self-insure. They assume all obligations in constitutional torts which police officers may get involved in. This was implemented 5 years ago. I, as a superior court judge, had the opportunity to sit and preside over constitutional tort cases. Interestingly enough, we found some interesting developments that occurred when the cities took this on.

First of all, there has not been an increase in constitutional torts committed when private governmental sectors stepped in. The contrary has been the case. I spoke just this morning with the law firm that represents the major police agencies. He indicated that, while law enforcement personnel have increased over the last 5 years, constitutional tort cases have dropped 50 percent. In all of the 5 years as a civil judge that I tried these cases, there were only two constitutional tort cases that were ever brought into my court. In both instances, the police department officers prevailed.

In addition to that, he indicated that in all of the history of those cases, only one time has a judgment been rendered against the Phoenix Police Department.

The net result is that contrary to the argument that once the Government assumes its obligation, somehow Federal agents will run out and start violating people's personal rights. The contrary has proven to be the case. It has had no appreciable effect. The contrary has been true that there have been no increase in litigation—the litigation has dropped and the results of that have been that the officers have continued to do the professional, quality jobs of investigation that they've always done in the past.

It's my feeling that rather than deter officers, what it really does is chill them in the many constitutional decisions which they must make. When we hear the arguments made, somehow certain rights will be lost by this legislation which *Bivens* gives, I submit, is nonsense.

When you look at the history of these cases over the last 10 years and stop and realize that you can count successful plaintiffs on one hand, I think, if anything, any reasonable mind would have to agree that this legislation is providing the plaintiffs opportunities that they have never had before.

I would respectfully urge passage of this legislation and would be happy to answer any questions.

Senator GRASSLEY. Mr. Cummings?

STATEMENT OF WILLIAM B. CUMMINGS, DIRECTOR, NATIONAL ASSOCIATION OF FORMER U.S. ATTORNEYS, ALEXANDRIA, VA.

Mr. CUMMINGS. Thank you, Mr. Chairman. I also thank you for the opportunity on behalf of myself as well as the association. The National Association of Former United States Attorneys is an organization that now has approximately 300 members. Our current president, Judge Barney Doneilson of your State, was recently asked to speak on behalf of the association, and was unable to be here and asked me if I would attend.

I served as U.S. attorney for the Eastern District of Virginia for 4 years, retiring 2 years ago, and am now in private practice in Alexandria, Va., so it was much more convenient for me to attend.

This association was formed partly for the reason of addressing legislation where our views might be sought because of our past experience, but that because of our no longer being associated with the Department of Justice our independence of thought might give our remarks slightly more credibility.

The association wholeheartedly endorses the legislation before this committee, and as the other people have spoken this morning, I won't try to go into quite as much detail because I think you've received quite a bit of detail this morning.

But I recall that when I was sworn in on March 17, 1975; it was only 2 days after the FBI in Alexandria had just knocked down the door of the apartment house of a resident in Alexandria thinking that they had finally found elusive Patty Hearst, and I knew it wouldn't be long thereafter that I would be getting some civil suits in my office. I thought when I took office that I was going to be a prosecutor and that certainly is a primary function of a U.S. attorney, but I think most people don't realize that approximately 50 percent of our business now is defending the United States in civil litigation brought by any number of litigants, including those seeking redress for alleged constitutional tort violations as well as for disgruntled employees suing for what they think is an improper grievance by a supervisor or the like. And sure enough the so-called Patty Hearst case did come to court. Judge Merhige tried the case. One of my assistants spent about 6 months, almost full-time, in preparing the defense of that case.

The agents, as Mr. Martin remarked a few moments ago, literally lived in fear of some form of runaway verdict. By virtue of negotiations with counsel, that case was heard nonjury, but many of the litigants seek a jury. And I can tell you that there are a great many of our Government employees who do not have a great deal of confidence in the ultimate fairness, if you will, of our jury system. Many of them are just literally scared to death. They have no liability insurance to cover them for the actions. They do not have a substantial income basically and therefore, do not have a substantial estate.

What little assets they do have built up, about the time they become a supervisor, they're thinking of things such as college expenses for their children. Just about that time, if they take a step in the wrong direction, they get sued and they see a million-dollar or $5-million lawsuit against them and for 6 months to 6 years, depending upon the length of time of the judicial system, they have that hanging over their head. I'm pleased to say that in my district it's more like 6 months than 6 years, but in many districts it drags out much longer.

One other incident that I personally was involved in and I recently testified in Norfolk in a suit where a disgruntled employee had been discharged from the Customs Service and he had been indicted and tried for illegally planting a listening device while on duty. He developed the theory that his superiors at Customs had conspired to rid him from the Customs Service and had forced or coerced the Justice Department and myself into indicting him so that they could get rid of him.

He therefore brought action not only against his superiors, but also against the Director of Customs. These individuals suffered, I can tell you, immensely. I talked with them on many occasions as the litigation progressed, and they were just a basket case, literally a basket case, during that period of time.

I testified as a Government witness, of course, that the process in our Department of Justice is such that outside agencies do not direct or dictate criminal process, but nevertheless, a jury trial commenced, there was a panel and 3 days later he received a big zero of a verdict, as he should have.

But had this legislation been in effect at the time, he would not have had the opportunity to run amuck with depositions, discovery, and the like into the lives and backgrounds of the individuals, which put they and their families through untold nights of worrying—all for the sake of just venting his anger, if you will, at the fact that he was discharged.

Again, the association, for those reasons and other reasons stated in my written remarks, wholeheartedly endorses the passage of this legislation.

I might point out, however, in response to a question, Mr. Chairman, that you asked Mr. Martin, that to the best my knowledge and that of the Department of Justice at the present time, there is no private insurance carrier currently willing to write malpractice insurance for Government attorneys. And the remarks Mr. Martin made about the Government attorneys fearing for their own safety, if you will, in representing these individuals is a very real one.

We had many meetings of my staff when I was U.S. attorney and the subject came up every time we had a meeting about the need to double-document and double-work and triple-work these civil cases defending the agents or employees—not just agents—individuals. It put a great deal more burden on the attorneys, forced them to work about three times as long and as hard on a case as they would if the United States was the named defendant.

Thank you very much.

Senator GRASSLEY. OK. I have a few questions, not too many, of each of you.

Mr. McDonald, I'll start with you. Do you currently—and I guess I wouldn't exclude you from answering if you want to, Mr. Cummings, too—do you currently have any *Bivens* actions in your office?

Mr. McDONALD. We have a number of *Bivens* actions, both in Phoenix and Tucson. In fact, one of the cases that we just filed a motion on within the last couple of weeks involved Joseph Batts Pattagria, a big operation that he was involved in and was convicted. One of the codefendants in his case is turning around now and suing the Federal FBI agents who had a minor role, and we've gone through the same motions for the same frivolous claims that they're making trying to defend them. They're very frequent and they consume enormous amounts of time by people in our office.

Senator GRASSLEY. Do you, Mr. McDonald, or Mr. Cummings, have any comments on the use of impleader as a substitute for this legislation?

Mr. McDONALD. When that question was originally raised, I thought, "I can't think of a more unworkable solution." When you stop and think that the Justice Department attorney's first obligation is to the United States, and that procedure they recommend would literally be putting the Government in the position of trying to decide whether or not to represent the agent on good faith and thereby bring the Government in, his obligation in each instance would be to protect the Government. So, in virtually every *Bivens* case when good faith would become an issue you would have to farm that case out to private counsel. That wouldn't solve anything. I think that would about quadruple the problem.

Mr. CUMMINGS. I just support the same remark.

Senator GRASSLEY. Mr. Cummings, and also I suppose, you, Mr. McDonald, mentioned that it is important that this legislation retain the good faith defense that is afforded to the defendant from a fiscal standpoint.

Do you also feel that the employee's reputation is on the line unless we do ascribe this defense to the United States?

Mr. CUMMINGS. There is no question that his reputation is on the line. I might just point out something that I did not mention in my earlier remarks. The good faith defense is absolutely essential, in my opinion, to pass through as the legislation proposes.

Certainly, we can say that a private civilian employer or corporation would have the ability to have all the defense available of the individual agent or employee pass through to the employer in a similar kind of situation.

So, the legislature follows the common law that is available to all civilian litigants. But I just pass on, I think Mr. Martin remarked about it, too, with regard to the agents. There's no question that after an agent has gone through a litigation of the kind that Bivens got or a Government supervisor who has gone through a similar kind of suit, that they are totally ineffective as aggressive, vigorous agents or decent, if you will, effective managers of people.

They just run around for the rest of their career with their tails between their legs. They just will not go out and take the kind of vigorous, aggressive, law enforcement action that we expect and demand, and that we certainly need in our society. Certainly, with the continual budgetary cuts on law enforcement personnel, which doesn't stop at all or slow down those who wish to take advantage of fewer agents in the field, to have less aggressive agents in the field would be disastrous, in my opinion.

Mr. MCDONALD. I would just add one comment to that, Mr. Chairman. I have found from my experience that law enforcement people really take these types of actions seriously. You do away with the good faith defense and an officer is then sued, there is no good faith defense for the Government and a judgment is rendered against him, the helpless feeling that I think they would feel when they think, "I've done everything reasonable. By hindsight, some judge has come along and has determined that what I did was unreasonable, but what else can I do? I go out and I do my very best, do my job, they don't give a good faith defense, and now the Government is tagged for a sum of money because of my actions." I think it would be devastating to the morale, and it just, in effect, turns out to be a giveaway. The Government agent has done nothing wrong, other than that a court has later determined that, perhaps by 20/20 hindsight, he should have done it differently.

Senator GRASSLEY. You two are the last witnesses that we have today. At this time, we will enter both of your full written statements into the record.

[The statements of Messrs. McDonald and Cummings follow:]

PREPARED STATEMENT OF A. MELVIN McDONALD

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE:

I am honored to be invited by this subcommittee to appear and address proposed legislation which would have a significant positive impact both in Arizona and within the various districts throughout the United States. I have come before this subcommittee to express my total and enthusiastic support for Senate Bill S.1775, which would amend Title 28 of the United States Code by providing for an "exclusive" remedy against the United States government for "constitutional" torts. I would like to briefly discuss a number of the more important reasons which support this proposed legislation.

1. S.1775 gives a legitimately aggrieved plaintiff a "remedy" for injuries sustained as a result of a constitutional tort perpetrated by a Federal Employee. Equally as important, the plaintiff has a solvent defendant, the United States.[A/]

2. The proposed legislation would provide financial protection to federal law enforcement personnel and their families.[B/]

3. The proposed legislation would *not* result in a significant negative impact upon the government's resources. The overwhelming majority of these cases which go to trial are won by the government and in those cases when losses do occur, the damages do

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[A/] In *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 at 410, Justice Harlan recognized the preferability of this type of remedy.

> "However desirable a direct remedy against the Government might be as a substitute for individual official liability, the sovereign still remains immune to suit."

Chief Justice Burger, in dissent, spoke directly to this issue. Speaking at 403 U.S. at 421, the Chief Justice observed that:

> "Congress should develop an administrative or quasi-judicial remedy against the government itself to afford compensation and restitution for persons whose Fourth Amendment rights have been violated."

[B/] While a number of states have authorized the purchase of liability insurance on behalf of their officers and employees, the Federal Government has not authorized the purchase of such insurance. Federal employees have had difficulty obtaining coverage on their own. Berman, *Integrating Governmental and Officer Tort Liability*, 77 Colum. L. Rev. 1175, 1181 (1977). Bell, *Proposed Amendments to the Federal Tort Claims Act*, 16 Harv. J. on Legislation 1, 3 (1979).

not involve significant sums of money.[C/]

4. The legislation would remedy a significant number of vexatious lawsuits which have been filed to harass or intimidate federal employees, to obtain civil discovery in criminal cases, or simply for revenge.[D/]

5. The legislation would enable the Department of Justice to do a more effective job in representing the government and its employees. Frequently, there is pressure on the Department to settle "winnable" cases, in which the United States is properly a defendant, where liability is remote so that agents can be spared the risks of financial ruin. This "personal exposure" gives *Bivens* cases a genuine "nuisance" value. Additionally, the Department of Justice (which almost always represents the employee being sued) frequently has conflicts among multiple defendants or between the defendants and the government. Tremendous sums of money are expended to provide these employees private counsel at government expense.

6. The proposed legislation would significantly contribute to improved morale within the Federal Government, particularly among law enforcement personnel. Indeed, it is difficult, if not impossible, to justify the perpetuation of the "Bivens" rule of "personal liability for constitutional torts" when one considers that, in a ten year period since *Bivens*, where probably tens of

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[C/] From 1971 to 1979, only seven money judgments had been entered against federal employees on *Bivens* claims; pending appeal, none had been paid. See Bell, *supra*, 16 Harv. J. on Legislation at 2 (Footnote 5). From 1979 to October 1981, only two more judgments were won by *Bivens* plaintiffs. See Statement of Edward C. Schmults, Deputy Attorney on Administrative Law and Governmental Relations, U.S. House of Representatives concerning amendments to the Federal Tort Claims Act, October 13, 1981, page 4 and footnote 11.

[D/] Justice Black, in the *Bivens* dissent at page 429, warned of this result. He noted:

> "There is also a real danger that such suits might deter officials from the *proper* and honest performance of their duties."

Justice Blackmun also warned of the real dangers of doctrine which imposes personal liability on federal officers. Speaking at page 430, he wrote:

> "Whenever a suspect imagines, or chooses to assert, that a Fourth Amendment right has been violated, he will now immediately sue the federal officer *in federal court*. This will tend to stulify proper law enforcement and to make the day's labor for the honest and conscientious officer even more onerous and more critical."

thousands of constitutional decisions have been made nationwide, successful prosecution of these cases could be counted on two hands.

Finally, Bivens lawsuits are ruinous to the target defendants. Plaintiffs' attorneys almost inevitably name as defendants all people directly, indirectly or remotely involved in the constitutional transaction. The list of defendants is frequently as large as the attorneys' imaginations.[E] These lawsuits interfere with federal employees' credit ratings with commercial institutions as well as imposing enormous strain not only on themselves but a whole class of innocent victims - their families.

In summary, the proposed amendment to the Tort Claims Act would go a long way towards satisfying the needs of all groups involved. A plaintiff injured by a constitutional tort has a sure remedy and a solvent defendant. Federal agents and their families are not threatened with financial ruin. Federal officers and prosecutors can pursue criminal investigations with traditional vigor. The vexatious plaintiff loses the key incentive to sue federal officers who may have investigated their activities. Government attorneys are no longer in the deplorable position of paying "nuisance" dollars so that remote but substantial losses would not be incurred by federal agents. Vast expenditures in hiring private attorneys where "conflicts" exist could be alleviated. To this bill, federal agencies in Phoenix and Tucson as well as this office lend their unconditional support.

[E] Former Attorney General Bell cited some examples of the totally frivolous lawsuits filed against him in the Harvard Journal of Legislation, Volume 16 at page 6, Footnote 22.

> "A significant percentage of the pending suits against federal employees are frivolous. For instance, I have been sued in my individual capacity for claims arising out of events occurring before I became Attorney General and events of which I have no knowledge or connection, such as the termination of a private school teacher by a school which indirectly receives funding from the Law Enforcement Assistance Administration, physical injuries received by inmates in federal prisons allegedly inflicted by guards and other inmates, deprivation of inmates' due process rights, and injuries to resident aliens allegedly caused by a statutory amendment to the Immigration and Nationality Act.

PREPARED STATEMENT OF WILLIAM B. CUMMINGS

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE:

Thank you for this opportunity to appear here today. The proposed amendments to the Federal Tort Claims Act constitute a significant improvement, which I and the members of my organization wholeheartedly endorse.

I served as the United States Attorney for the Eastern District of Virginia from March 1975 to June 1979, and am now engaged in private practice across the river, in Alexandria, Virginia. I am appearing here today on behalf of the National Association of Former United States Attorneys, having been requested to do so by the current President, Judge Allen (Barney) Donielson of the Iowa Court of Appeals. Senator Grassley was thoughtful enough to invite a representative from our association to speak on this bill.

The Association was formally incorporated in 1979 by several recently retired United States Attorneys who thought there might be a need for a vehicle to assist former United States Attorneys in maintaining contact with each other and address legislation like the current bill and express our views. While our views may be similar to the position of the current administration at any given time, unlike the U.S. Attorneys now in office, we are not constrained in our ability to disagree with the administration position if we felt the need to. We think that such independence, as well as our prior experience, will enhance the credibility of our remarks.

The National Association of Former United States Attorneys, of which I am a founding member and current member of the Board of Directors, now has almost 300 members, and it is gaining at a rapid rate as word of our existence continues to spread. Life membership is open to former presidentially appointed U.S. Attorneys, and an associate membership is open to all court-appointed United States Attorneys and Department of Justice officials who have served pursuant to a presidential commission. The experience in office of our members ranges from U.S. Attorneys with nearly 30 years of experience to those who were very short-term court appointees. Thus our membership has a wide spectrum of experience, sizable age differences, and broad geographical distribution. All our members, however, have dealt with the Federal Tort Claims Act, and are aware of some of its deficiencies.

Regarding Senate bill 1775, the Association endorses the bill and urges its passage. Based on our collective experience, this is a bill that has been needed for a long time, particularly since the landmark Bivens decision by the Supreme Court in 1971.

Many people are not aware of the tremendous civil caseload that is handled by the U.S. Attorneys' offices, and the fact that they are usually the front line litigator on behalf of the federal government. As noted by Deputy Attorney General Schmults, since Bivens there has been a large increase in the number of suits brought against law enforcement officers and other government employees, where the theory of the suit is the constitutional tort that you have heard described by Deputy Attorney General Schmults.

In addition to the constitutional tort claims, there are many suits that are filed naming the individual employees as defendants, including suits by disgruntled government employees who sue their former supervisors alleging a wrongful discharge. Unlike drivers of government vehicles and government doctors, who are protected by special legislation preventing them from being sued individually, the bulk of federal employees are not so protected for acts committed during the scope of their employment. I might add that this also includes actions of government attorneys in defending government employees.

In our experience, whenever a government employee is directly sued, rather than in a suit against the government arising out of an employee's conduct, the assistant U.S. Attorney handling the case has to spend far more of his time in preparing his defense. This is so for several reasons, including the tremendous anxiety that the government employee is under and the concern that the government attorney has for his well-being, as well as the concern that the government attorney has for his own well-being. The government attorney is not immune from civil malpractice suits, and, for all practical purposes, cannot obtain malpractice coverage. Thus, if the defendant employee that he represents is aggrieved by the decision in the case he is handling, he may decide to bring a malpractice action against the government attorney. This is a very real concern these days with all the talk about malpractice litigation.

Just recently I had to testify as a government witness in a suit brought by a disgruntled former Customs patrol officer. He brought suit against the Director of Customs and several of the supervisory personnel, alleging that they conspired together to seek his indictment for criminal charges in an effort to rid him from the service. I was called to testify that the decision to prosecute this employee for illegally installing a listening device without court order was made by myself and the proper officials at the Department of Justice, not by Customs. This, however, did not stop the employee from dragging these officials through a year and a half of litigation, pulling them away from their government duties for depositions and attendance at trial, all the while fearful that some misinformed jury might render a runaway verdict and cause them financial ruin.

Anybody who has been through litigation where he was a named defendant can attest to the anxiety that such an experience produces. In the case of government law enforcement officials, or supervisory officials, who are sued individually for having discharged in good faith their respective functions, their willingness to perform their duties with the desired vigor after such litigation is destroyed, at least temporarily, and, for many, permanently. By requiring that all such suits be brought in the name of the United States, or to have the United States substituted as a party defendant upon motion of the Attorney General, most of the grievances that I have outlined will be eliminated.

I note that the proposed bill provides that the good faith defense now available in constitutional tort cases would pass through and be available to the government under the current wording of the bill. The Association supports this provision, which is similar to civil common law allowing the employer to have the benefit of the defenses of his agents or employees. Without this provision, the government would be, in effect, the insurer of the actions of any and all of its employees, and literally open the door for a raid on the treasury.

In conclusion, the Association endorses the bill in its present form, and urges its passage.

Senator **GRASSLEY**. I want to thank you as well as all of the other people who appeared for helping us to make what I feel is a very valuable record.

We're going to have another hearing, a continuation of this hearing, on this legislation on Monday at 9:30 a.m.

And again, I want to thank all of you, whether you're people who testified or people who are in the audience listening. Thank you for your patience.

This hearing is adjourned.

[Whereupon, at 11:08 a.m., November 13, 1981, the subcommittee adjourned, subject to the call of the Chair.]

FEDERAL TORT CLAIMS ACT

MONDAY, NOVEMBER 16, 1981

U.S. SENATE,
SUBCOMMITTEE ON AGENCY ADMINISTRATION,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met,.pursuant to notice, at 9:30 a.m., in room 357, Russell Senate Office Building, Hon. Charles E. Grassley (chairman of the subcommittee) presiding.

Staff present: John Maxwell, chief counsel and staff director, and Lynda Nersesian, counsel.

OPENING STATEMENT OF SENATOR CHARLES E. GRASSLEY

Senator **GRASSLEY**. Welcome to the second day of the hearings on S. 1775. Today marks the second day of hearings, which deal with the constitutional tort actions in which the Attorney General certifies that the employee is acting within the scope of his or her employment. Furthermore, subject to some exceptions, the Government would likewise be liable for common law torts.

In addition, for the first time the United States could be sued for a *Bivens* or constitutional tort. The exclusive remedy in such a case would also be against the United States.

Last Friday we heard from the Department of Justice, which strongly supports this legislation. Deputy Attorney General Schmults noted that suits against Government employees in their personal capacities have increasingly arisen out of regulatory or personnel actions taken by Federal officials. The Department estimates that there are at present in excess of 2,000 lawsuits pending against Federal employees in their individual capacities.

The American Civil Liberties Union testified against this legislation, stating that a Federal Tort Claims Act remedy is neither an adequate nor constitutional substitute for a direct suit against a wrongdoing official.

We heard challenges to the ACLU argument based on the Supreme Court language expressly deferring to congressional initiatives in this area. The Court has stated that where Congress has provided a remedy which Congress declares to be a substitute for recovery directly under the Constitution and which it views as equally effective, the Court will defer to such an interpretation.

Last Friday we also heard from an Idaho forest ranger who shared his experience of being sued for disposing of what he took great pains to determine was abandoned property. His suit began in 1975, resulted in a plaintiff's judgment in 1978, was appealed and upheld by a circuit court in 1980, and has been remanded by the Supreme Court back to the Circuit Court for the 9th Circuit this past year.

Finally, we heard from a number of current and former U.S. attorneys who testified as to the devastating effect that these suits have on a Government employee. These U.S. attorneys are in the best position to view the manpower and Government resources that are necessarily drained in the defense of these suits.

Our first witness today is Mr. William Howard Taft, General Counsel for the Department of Defense. Mr. Taft, we welcome you to this hearing and are anxious to hear what you have to say on this very important issue.

STATEMENT OF WILLIAM H. TAFT IV, GENERAL COUNSEL, DEPARTMENT OF DEFENSE

Mr. **Taft**. Thank you, Mr. Chairman. I am pleased to appear before you today to present the views of the Department of Defense on S. 1775, which would substitute the U.S. Government as party defendant in all tort actions against Federal employees who have acted within the scope of their offices or employment.

The effect of this legislation would be to shield Federal employees from the harassing and distracting effects of cases involving common law and constitutional torts, allegedly arising from the performance of their official duties. Because such litigation detracts from the effectiveness and efficiency of the Government, the Department wholeheartedly supports the enactment of S. 1775.

I would like to present some of the highlights of my statement, Mr. Chairman, and would ask that the statement, as prepared, be included in the record, if that is agreeable to the subcommittee.

Senator **Grassley**. Yes; and for the benefit of other witnesses yet to come, I should suggest that we would appreciate any summarizing. Your entire statement will be placed in the record, if you desire, and the record will be open for 14 days for additional written statements that anybody might want to submit. Also, I would suggest that because of the press of other Senate business, other members of the subcommittee sometimes can't come and you may expect written questions from anybody on the committee. We would appreciate your answering in writing.

Mr. Taft?

Mr. **Taft**. Well, we'll be delighted to answer any questions that come to us, either here or in due course.

I will proceed with my statement.

The enactment of S. 1775 would protect employees of the Department of Defense and other Federal agencies from the disruptive and onerous effects of defending tort litigation. Equally important, the bill would insure that the Government is able to manage the defense of tort cases that attack the official conduct of its employees.

As the law now stands, the Government loses that control when it is necessary for it to retain private counsel to represent individual employees whose litigation interests conflict with those of the Government. Passage of S. 1775 would also, of course, save the substantial expense of private counsel fees.

Since 1976, the Department of Justice, we understand, has paid more than $2 million in fees to private lawyers representing employee defendants.

The need for S. 1775 is dramatically demonstrated by the experience of the Department of Defense. The threat of lawsuits is a daily companion of members of the Department, from the most senior officials of the Office of the Secretary of Defense, including the Secretary himself, the military departments, and the defense agencies, to operational military and civilian personnel in the field.

The potential of time-consuming and expensive litigation may distort the Department's decisionmaking processes while actual cases divert Department of Defense employees from their primary mission, the protection of national security.

Constitutional tort litigation against employees of the Department arises in a wide range of contexts, running the gamut of the Department's activities and striking against employees of virtually every component. Perhaps the best argument for our need for curative legislation is a description of a sample of constitutional tort issues that have confronted or are now confronting the Department and its employees.

I would like to describe several of these cases for you.

Personnel decisions are a fertile ground for constitutional tort lawsuits. I am especially familiar with this particular sort of suit, inasmuch as I, myself, was sued for a constitutional tort in my earlier incarnation as General Counsel of the Department of HEW, along with 15 other officials, including three secretaries of the Department.

Because of its highly sensitive functions, the National Security Agency in the Department of Defense must be especially careful that its employees are fully dependable.

In achieving this goal, supervisors, personnel administrators, and security administrators, among others are particularly vulnerable to claims of personal liability. These professionals are essential to the agency because they perform important roles in personnel security adjudications and in assuring the continuing security necessary to intelligence and communications security functions.

Since 1980, as a result, in large part, of the *Doe* case, agency managers in increasingly larger numbers have requested information about their potential personal liability in constitutional tort litigation, and have asked what can be done to protect them from such liability. The threat of personal liability makes it harder for these officials to make difficult, particularly negative, judgments that are required in light of prudent security concerns.

In at least one case, some National Security Agency psychologists have been sued in both their official and personal capacities. In addition, they and their colleagues are particularly concerned about the fact that their private insurance does not protect them against punitive damages. According to the agency, the professional judgments of its staff psychologists may be influenced by their perception of the risk of litigation and personal liability.

Employees of military departments have also been sued because of the plaintiff's dissatisfaction with personnel actions. In one such case, an Army physician who was displaying psychiatric problems was recently removed from his residency program in order to undergo mental evaluations measuring his fitness for further military service.

Because of his condition, his supervisors also deleted his name from a promotion list and withdrew his bonus pay. Even though these actions were based on the best professional judgment of the doctors and commanders, the physician sued the Army and 10 Army and Navy officers in their individiual capacities. These officials must not only try to determine how best to deal with an individual with serious emotional problems, but also defend their decisions in Federal court.

The second matter involved a female civilian employee who was a temporary equal employment opportunity counselor at an Army post. She applied for a promotion but another, more qualified, person was selected. The employee also applied for a different, permanent, equal employment opportunity position and she was selected for that job, which carried greater opportunity for promotion. Nevertheless, she has sued her supervisor and the civilian personnel officer in their personal capacities. Thus, these officials find themselves forced to defend their actions in Federal court against a plaintiff seeking large damages for decisions made in good faith.

In addition, the plaintiff has also named the Secretary of the Army as a defendant in his personal capacity, even though he has had no direct contact with the challenged personnel actions.

This case illustrates the vulnerability of senior officials to hectoring suits brought by dissatisfied employees.

The legal assistance services offered to military members by Judge Advocate General Corps attorneys have also come under attack. In a pending case, a Marine Corps legal assistance officer in North Carolina gave advice on a separation agreement to an estranged couple. The wife subsequently obtained a court order invalidating the agreement because of a provision in the State law.

The husband, a retired military member, then filed a claim with the Naval Legal Assistance Office alleging legal malpractice and demanding damages. This claim is currently under investigation. The Marine Corps informs me that as a result of this case its legal assistance officers are increasingly reluctant to give advice in unsettled areas of the law. Instead, they are referring clients to private attorneys, and this has jeopardized the effectiveness of the legal assistance program, which we are extremely proud of, and depend very heavily upon.

Constitutional tort litigation has been used to try to hinder the Department in performing its mission. For example, a Defense Department contractor brought an action against the Director of the Defense Logistics Agency and several subordinate officials in a regional office for asserted violations of its constitutional rights under the first, fifth, and ninth amendments to the Constitution.

The case centers on an undated, unsigned, memorandum that was allegedly prepared by Agency officials and, the plaintiff maintained, contained unfavorable characterizations of the contractor.

The court found that the substance of the memorandum was not of such a nature as to deprive the contractor of its constitutional rights, nor could the limited use of the memorandum constitute publication. Specifically, the court held that communications with authorized governmental agencies did not amount to publication. Any review of the memorandum in this case had taken place during an investigation made necessary by the contractor's own allegations.

In another case, a pilot in the Air Force Reserve was assigned to McCord Air Force Base in Washington. So far as the Air Force knows, he had no full-time civilian job, but relied heavily on the military reserve pay, supplemented by compensation for auto repairs and other odd jobs. Throughout the early 1970's, the pilot's performance had provoked increasing dissatisfaction. Virtually all his flights resulted in personality conflicts with fellow air crew or ground crew members and, in some cases, with commanders.

In early 1975, two Air Force flight surgeons recommended that the pilot be temporarily grounded, pending a complete psychiatric evaluation of his competency for safe flying. They based their recommendation on intensive discussions with him. He then refused to appear for a scheduled flight to the Wilford Hall USAF Medical Center for the psychiatric evaluation. His grounding continued, and since his primary duty was flying, he was later discharged from the Air Force Reserve. On April 9, 1970, he sued 14 commanders and medical personnel individually for violation of his constitutional rights, seeking damages of $3½ million.

The defendant's motion to dismiss was granted by the District Court, but the plaintiff has appealed to the Ninth Circuit Court of Appeals.

Three Defense Contract Audit Agency and three Defense Logistics Agency employees are currently defendants in an action in Federal district court. In August 1980, the auditors were auditing a claim of a Government contractor pursuant to an order of a judge of the Armed Services Board of Contract Appeals. The audit disclosed possible irregularities relating to a different case involving the contractor. As a result of this discovery, the Defense Logistics Agency trial attorney petitioned the Board to reopen that case for the introduction of new evidence. Soon thereafter, the contractor sued, alleging that the auditors violated his fourth amendment right against unreasonable searches and seizures. That case has not yet gone to trial.

Although the auditors had both contractual authority and Board permission for their audit, they now must endure the personal hardship of lengthy proceedings and possible personal financial liability. As may be expected, the morale of the employees is affected. In addition, since they are being sued for conduct which is representative of the routine work performed by all Defense Contract Audit Agency auditors, the litigation is troubling to the entire audit staff of the Agency.

These cases and others which I have also reviewed in my prepared statement are all different, but they share a common theme. Employees throughout the Department of Defense may be personally liable for decisions and other actions taken in good faith and upon a reasonable belief in their legality. If an employee is so unfortunate as to be sued, he must devote substantial time, worry, and perhaps money to defending the case. Even if the employee wins, he loses, because of the anxiety produced by the litigation and the worry of financial disaster. Indeed, an employee defendant may experience difficulty in obtaining a mortgage or personal loan while his case is pending.

The Government also loses, although its costs are measured in timid decisionmaking, dispirited employees, and wasted energy, as well as financial loss.

S. 1775 would largely eliminate these problems by freeing Federal employees who act within the scope of their authority from the personal danger of tort litigation. Employees who abuse their offices would not, however, escape punishment, since this bill contains a mechanism for investigating and disciplining employees whose conduct results in a judgment against, or settlement, by the Government.

The Department endorses this balanced approach and urges the subcommittee to report favorably on S. 1775.

Thank you, Mr. Chairman. I'll be happy to answer any questions that you may have.

Senator GRASSLEY. I don't believe you told us what happened to the suit that was filed against you.

Mr. TAFT. It was settled. I believe there were 15 or 20 defendants, including the Department of HEW itself, and the suit was settled before trial for, I think, $10,000, but not before all of the defendants had spent a full day giving depositions to the plaintiff and then another full day having to go down to Richmond to wait on the court and spend their time down there wondering whether the case would be settled or not.

Senator GRASSLEY. Are you aware of any efforts that are being made to provide insurance for emoloyees in the military that would protect against such suits?

Mr. TAFT. No; I am not aware of any efforts along that line. In the military, we have, of course, a slightly different situation, where the members do have some protection within their military activities, under the Feres doctrine.

Senator GRASSLEY. I wanted to ask a question about the Feres doctrine. That doctrine states that the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or in the course of the activity incident to the service. Can you foresee any impact that this legislation might have on the Feres doctrine?

Mr. TAFT. No; I would think that the Feres doctrine, which has been in effect since 1951 and has been recently spoken favorably of by the Supreme Court, would survive intact as relates to the relationship between military officers and their subordinates in a military context. It would remain unaffected by this legislation.

Senator GRASSLEY. As you know, this legislation provides that if there is any disciplinary action against an employee, it would come as a result of reference from the Attorney General. How would the military handle such a reference from the Attorney General, and this is all in the vein of seeing that there's proper accountability for any action that any Federal employee might carry out.

Mr. TAFT. Well, I think that the military, just as all the other elements of the Department of Defense, would take very seriously any reference from the Attorney General in this respect. We would have the system in place to investigate the situation and would take the proper administrative action in the case of the civilian employees, as would be provided under the statutes protecting them, and the military members would be subject to the military regulations. There is available under both sets of guidance full authority to reprimand, or otherwise punish. Any sanction that would be deemed appropriate in a given case would be available, and we would use that and I think take very seriously any reference by the Attorney General to us of improper conduct. We would follow up on it, I can assure you.

Senator **Grassley**. Could you tell us how the legal assistance program operates in the military, and it's my understanding that it's in jeopardy, and tell us why?

Mr. **Taft**. Well, the legal assistance program operates through the JAG Corps on the individual bases and posts that we have throughout the world. We attempt through that program to provide our servicemen with the sort of garden variety legal advice that they would require. We attempt to draft wills for servicemen if they wish, to give them advice on other sorts of problems, legal problems, that they might be running into, of a civilian sort, and also to do some work in the family law area for service members.

Over the last 15 to 20 years, we have tried to increase the amount of advice and time that we are able to dedicate to our service members so that they will have this available for them. On the whole, it has been an extremely successful program and well received by the service members who have used it.

The difficulty that we have seen emerging, and one of the examples that was in my statement illustrated this, is that when the JAG officer gives the legal advice to the service member or, indeed, to any of his dependents, that the advice might not be up to date or that he would run some risk, much as any private practitioner would, of not quite getting it right. He is then subject to a malpractice suit in the private sector. There is plenty of insurance. Any law firm or lawyer would carry malpractice insurance, just because of this eventuality.

In the case of our JAG Corps, we have now gotten some constitutional tort actions against the individual lawyers, such as the one that I spoke of in North Carolina, and this has a discouraging effect on the willingness of the lawyers to give the advice that the servicemen seek or to give any advice at all on that subject, or on a difficult subject where they might need it.

Senator **Grassley**. I hope you have the information pertaining to this question. I'm curious whether the Department of Defense has any statistics which indicate whether the number of suits against Veterans' Administration medical personnel or those employed by the Department of Defense have increased or decreased since various statutes have been enacted which provide immunity against them. These acts were passed in 1965, 1970, and 1976. Critics of the legislation we have before us suggest, as you know, that personal suits are necessary as a deterrent against improper conduct by Federal employees.

Where we have granted Federal employees statutory immunity, I'm curious as to whether or not there is evidence of increased violations.

Mr. **Taft**. No; we have no evidence along that line. The doctors who are in our Department, in the Department of Defense, as well as, I assume, in the Veterans' Administration, although I'm not as familiar with that, have their professional conduct at stake and, of course, perform at the very best of their abilities. The suits that would come have not at all increased as far as I am aware and we have no information indicating that either there or in the driver of automobile cases, where there is also an exclusive remedy against the United States, there is any more negligence than there was before.

Senator GRASSLEY. Mr. Taft, I believe that we will probably have more questions we would want to put to you in writing. I've already indicated that to you as well as the possibility of questions submitted to other witnesses from all members of the subcommittee. In the meantime, I thank you very much for your testimony and your kind attention to helping us promote this legislation.

Mr. TAFT. I thank you, Mr. Chairman. We'll do anything we can to forward the legislation's prospects and to work with the committee.

I would like to have my full remarks placed in the record.

Senator GRASSLEY. Yes; we will certainly want to do that. Without objection, your full remarks will be placed in the record.

[The prepared statement of Mr. Taft follows:]

PREPARED STATEMENT OF WILLIAM H. TAFT IV

Mr. Chairman and Members of the Subcommittee:

I am pleased to appear before you today to present the views of the Department of Defense on S. 1775, which would substitute the United States Government as party defendant in all tort actions against federal employees who have acted within the scope of their offices or employment. The effect of this legislation would be to shield federal employees from the harassing and distracting effects of cases involving common law and constitutional torts allegedly arising from the performance of their official duties. Because such litigation detracts from the effectiveness and efficiency of the Government, the Department wholeheartedly supports the enactment of S. 1775.

Before turning to specific incidents in which actual or threatened constitutional tort lawsuits have jeopardized the ability of the Defense Department to perform its mission, I would like to highlight several provisions of the legislation that are especially welcome. First, S. 1775 would make the Government the exclusive defendant in tort actions based on common law as well as constitutional theories if the Attorney General certifies that the challenged act or omission of the employee was within the scope of his employment. The Attorney General's certification would be conclusive, but if the Attorney General does not reach a decision, the employee may petition the court prior to trial to issue the certification. This approach is far preferable to the present situation, in which all federal employees are personally vulnerable to constitutional tort actions. In the area of common law liability, there is currently a crazy-quilt of statutory provisions. While some employees, such as drivers and certain physicians, may not be sued in tort for actions or omissions within their scope of employment, others, such as

Presidents, Members of Congress, and customs collectors, are not so lucky. S. 1775 would correct all of that, by interposing the United States Government as the defendant in common law and constitutional tort cases.

Second, the proposed legislation would retain defenses available to the individual employee, in addition to preserving the Government's own defenses. This would enable the Government to defend against a claim by asserting, for example, the qualified immunity of the alleged tort-feasor or his reasonable good faith belief in the lawfulness of his conduct. Since the Government is placed in the position of the challenged employee, it ought to be able to invoke all of the employee's defenses. This is especially important in the context of S. 1775, since the legislation would require the Attorney General to forward cases that are lost or settled to the head of the employee's agency. The agency head would then be obliged to undertake an administrative investigation or disciplinary action if appropriate. Significantly, retention of individual and governmental defenses would merely preserve the present position of plaintiffs in litigating constitutional tort actions.

Third, under S. 1775, the current Federal Tort Claims Act provisions regarding attorneys' fees would be extended to constitutional tort actions. This means that successful plaintiffs would be entitled to attorneys' fees on a uniform basis, regardless of whether their cases rest on common law or constitutional claims. To permit lawyers alleging constitutional theories to obtain larger fees than those bringing common law cases would encourage artful pleading without necessarily affording additional protections to plaintiffs.

In short, the enactment of S. 1775 would protect employees of the Department of Defense and other federal agencies from the disruptive and onerous effects of defending tort litigation. Equally important, the bill would ensure that the Government is able to manage the defense of tort cases that attack the official conduct of its employees. As the law now stands, the Government loses that control when it is necessary for it to retain private counsel to represent individual employees whose litigation interests conflict with those of the Government. Passage of S. 1775 would also, of course, save the substantial expense of private counsel fees. Since 1976, the Department of Justice has paid more than two million dollars in fees to private lawyers representing employee-defendants.

The need for S. 1775 is dramatically demonstrated by the experience of the Department of Defense. The threat of lawsuits is a daily companion of members of the Department, from the most senior officials of the Office of the Secretary of Defense, the Military Departments and the Defense agencies to operational military and civilian personnel in the field. The potential of time-consuming and expensive litigation may distort the Department's decision-making processes, while actual cases divert Department of Defense employees from their primary mission, the protection of the national security.

Constitutional tort litigation against employees of the Department arises in a wide range of contexts, running the gamut of the Department's activities and striking against employees of virtually every component. Perhaps the best argument for our need for curative legislation is a description of a sample of constitutional tort issues that have confronted or are now confronting the Department and its employees. I would like to describe several of these cases for you.

Personnel decisions are a fertile ground for constitutional tort lawsuits. Because of its highly sensitive functions, the National Security Agency must be especially careful that its employees are fully dependable. In achieving this goal, supervisors, personnel administrators, personnel security administrators, psychologists and their assistants are particularly vulnerable to claims of personal liability. These professionals are essential to the Agency because they perform important roles in personnel security adjudications and in assuring the continuing security necessary to intelligence and communications security functions. Since 1980, partially as a result of the Doe case, Agency managers, in increasingly larger numbers, have requested information about their potential personal liability in constitutional tort litigation and have asked what can be done to protect them from such liability. The threat of personal liability makes it harder for these officials to make difficult -- particularly negative -- judgments that are required in light of prudent security concerns.

Psychologists who must assess the reliability of applicants and employees are particularly troubled by the specter of personal liability. Their judgments must be unbiased and unfettered if they are to make accurate assessments of the emotional stability and reliability of current employees, applicants, and others with access to sensitive cryptologic information. The decision on whether an employee or applicant meets the psychological standards for employment at the National Security Agency is based solely on the psychologist's clinical judgment. Understandably, such judgments require the drawing of fine lines.

In at least one case, some National Security Agency psychologists have been sued in both their official and personal capacities. In addition, they and their colleagues are particularly concerned about the fact that their private insurance does not protect them against punitive damages. According to the Agency, the professional judgments of its staff psychologists may be influenced by their perception of the risk of litigation and personal liability.

Employees of the Military Departments have also been sued because of a plaintiff's dissatisfaction with personnel actions. In one such case, an Army physician who was displaying psychiatric problems was recently removed from his residency program in order to undergo mental evaluations measuring his fitness for further military service. Because of his condition, his supervisors also deleted his name from a promotion list and withdrew his bonus pay. Even though these actions were based on the best professional judgments of his doctors and commanders, the physician sued ten Army and Navy officers in their individual capacities. These officials must not only try to determine how best to deal with an individual with serious emotional problems but also defend their decisions in federal court.

A second matter involved a female civilian employee who was a temporary equal employment opportunity counselor at an Army post. She applied for a promotion, but another, more qualified woman was selected. The employee also applied for a different, permanent equal employment opportunity position. She was selected for this job, which carried greater opportunity for promotion. Nevertheless, she has sued her supervisor and the civilian personnel officer in their personal capacities. Thus, these officials find themselves forced to defend their actions in federal court against a plaintiff seeking large damages for decisions made in good faith. In addition, the plaintiff has also named the Secretary of the Army as a defendant in his personal capacity even though he has had no direct contact with the challenged personnel actions. This case illustrates the vulnerability of senior officials to hectoring suits brought by dissatisfied employees.

Yet another case that went to trial concerned a Navy captain and a GS-14 supervisor who allegedly violated the plaintiff's fifth amendment rights in connection with, among other things, marginally satisfactory performance ratings, letters of caution and reprimand, and a suspension. Although their requests for representation were granted by the Department of Justice, both defendants were extremely anxious about their personal vulnerability to an adverse decision. One of them conferred almost daily with a Navy attorney, expressing his trepidation over buying a new house, going on vacation or taking official travel. At the trial, the plaintiff's case was so weak that the judge granted the Government's motion to dismiss after the presentation of the plaintiff's evidence. The plaintiff then appealed to the Court of Appeals for the Fourth Circuit, which affirmed the district court's decision in a three-paragraph memorandum opinion. Nonetheless, in this case, as in almost all cases where officials are sued in their personal capacities, the chilling effect of personal financial liability for official actions spread to the defendants' colleagues.

The legal assistance services offered to military members by judge advocate general corps attorneys have also come under attack. In a pending case, a Marine Corps legal assistance officer in North Carolina gave advice on a separation agreement to an estranged couple. The wife subsequently obtained a court order invalidating the agreement because of a technicality of state law. The husband, a retired military member, then filed a claim with the Naval Legal Services Office alleging legal malpractice and demanding damages. This claim is currently under investigation. The Marine Corps informs me that, as a result of this case, its legal assistance officers are increasingly reluctant to give advice in unsettled areas of the law. Instead, they are referring clients to private attorneys. This has jeopardized the effectiveness of the legal assistance program.

Constitutional tort litigation also has been used to try to hinder the Department in performing its mission. For example, a Defense Department contractor brought an action against the Director of the Defense Logistics Agency and several subordinate officials in a regional office for asserted violations of its constitutional rights under the first, fifth, and ninth amendments to the Constitution. The case centered on an undated, unsigned memorandum that was allegedly prepared by Agency officials and, the plaintiff maintained, contained unfavorable characterizations of the contractor. The court found that the substance of the memorandum was not of such a nature as to deprive the contractor of its constitutional rights, nor could the limited use of the memorandum constitute publication. Specifically, the court held that communications with authorized governmental agencies did not amount to publication. Any review of the memorandum in this case had taken place during an investigation made necessary by the contractor's own allegations.

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In early February 1975, two Air Force flight surgeons recommended that the pilot be temporarily grounded, pending a complete psychiatric evaluation of his competency for safe flying. They based their recommendations on intensive discussions with the pilot. He then refused to appear for a scheduled flight to the Wilford Hall USAF Medical Center, Lackland Air Force Base, Texas, for the psychiatric evaluation. His grounding continued, and since his primary duty was flying, he was later discharged from the Air Force Reserve. On April 9, 1979, he sued 14 commanders and medical personnel individually for violation of his constitutional rights, seeking $3,500,000. The defendants' motion to dismiss was granted by the district court, but the plaintiff has appealed to the Ninth Circuit Court of Appeals.

Three Defense Contract Audit Agency and three Defense Logistics Agency employees are currently defendants in an action in federal district court. In August 1980, the auditors were auditing a claim of a Government contractor, pursuant to an order of a judge of the Armed Services Board of Contract Appeals. The audit disclosed possible irregularities relating to a different case involving the contractor. As a result of this discovery, the Defense Logistics Agency trial attorney petitioned the Board to reopen that case for the introduction of new evidence. Soon thereafter, the contractor sued, alleging that the auditors violated its fourth amendment right against unreasonable searches and seizures. The case has not yet gone to trial.

Although the auditors had both contractual authority and Board permission for their audit, they now must endure the personal hardship of lengthy proceedings and possible personal financial liability. As may be expected, the morale of the employees is affected. In addition, since they are being sued for conduct which is representative of the routine work performed by all Defense Contract Audit Agency auditors, the litigation is troubling to the entire audit staff of the Agency.

Common law tort actions against employees of the Department have also been disturbing. For example, in October 1979 a civilian employee of the Army Corps of Engineers in Puerto Rico left the bulldozer on which he was working. He was subsequently caught between the bulldozer, which was operated by another Corps employee, and a truck. In October 1980, the injured man brought a two million dollar action against several persons in their individual capacities. One, a supervisory geologist for the Corps, had not even been in Puerto Rico for several months prior to the accident; his role was to select work sites. A second defendant is the resident engineer for a Corps project in Puerto Rico. He was not present when the accident occurred and had no connection with either the accident or the plaintiff and his coworkers. The driver of a drill rig on the truck and the driver of the bulldozer were also sued. This case has yet to be decided. Thus, for over a year these defendants have been the targets of litigation that could destroy them financially.

These cases are all different, yet they share a common theme: employees throughout the Department of Defense may be personally liable for decisions and other actions taken in good faith and upon a reasonable belief in their legality. If an employee is so unfortunate as to be sued, he must devote substantial time, worry, and perhaps money to defending the case. Even if the employee wins, he loses, because of the anxiety produced by the litigation and the worry of financial disaster. Indeed, an employee-defendant may experience difficulty in obtaining a mortgage or personal loan while his case is pending. The Government also loses, although its costs are measured in timid decision-making, dispirited employees, and wasted energy.

S. 1775 would largely eliminate these problems by freeing federal employees who act within the scope of their authority from the personal danger of tort litigation. Employees who abuse their offices would not, however, escape punishment, since this bill contains a mechanism for investigating and disciplining employees whose conduct results in a judgment against, or settlement by, the Government. The Department endorses this balanced approach and urges the Subcommittee to report favorably on S. 1775.

Thank you, Mr. Chairman. I would be happy to answer any questions the Subcommittee may have.

Senator **Grassley**. Our next witness is Mr. Alan B. Morrison, director of litigation with the Public Citizen Litigation Group, which is a nonprofit corporation.

Mr. Morrison, I understand that you have been vocal with respect to this litigation in the past and appreciate your presence here today.

STATEMENT OF ALAN B. MORRISON, DIRECTOR OF LITIGATION, PUBLIC CITIZEN, WASHINGTON, D.C.

Mr. **Morrison**. Thank you, Mr. Chairman. It's a pleasure to be here before the subcommittee today. I have a prepared statement. In accordance with the chairman's instructions, I ask that it be placed in the record in full and I will not read from it but summarize the contents of it.

It is my pleasure to appear here today to continue with an important matter on which I began work in 1977. Since the time that the Carter administration first introduced a proposal not dissimilar to S. 1775, a great deal of work and change went into it. A number of areas that were troubling to us initially were substantially changed, as outlined in my prepared statement, and yet we find here today, with S. 1775, that this bill has taken three gigantic steps backward.

Before pointing to those three problem areas, let me say that although I have some philosophic reservation about the concept of substituting the United States as a defendant in all tort cases, I believe that, on balance, substitution is a wise idea in the interest of the United States and in the interest of victims of tortious conduct.

It is a good idea, however, only if two conditions are met. First, there must be a meaningful alternative remedy and, second, there must be meaningful deterrence. Unfortunately, S. 1775 fails to satisfy either criterion.

First, as to a meaningful alternative remedy, basically this legislation would substitute the deep pocket of the United States, plus liquidated damages, for the right to trial by jury and the right to punitive damages, which are currently available for constitutional torts committed by members of the Federal service.

Liquidated damages, in our view, are absolutely necessary because in most cases of constitutional torts, unlike common law torts, there are no demonstrably large dollar damages. We don't have situations where negligent automobile accidents or malpractice cause a significant personal injury of the kind which is familiar in tort litigation and which produce substantial judgments.

On the other hand, the necessity for liquidated damages also means that by and large in the true constitutional tort case, and I would suggest that many of the cases we've heard today are contract cases masking as constitutional torts which will not long fool many of the intelligent judges we now have, there will be low amounts of actual damages, which indicates a reduced need for a deep pocket. You can always put some zeroes at the end of your clause in the complaint, but most people realize when there's any real possibility of any significant damages.

Now, having set the background, it's important to focus on the two problems that I see in the legislation in the meaningful alternative area. First is the retention of the good faith defense and, second, is the failure to include attorneys fees in these constitutional tort cases.

As to the elimination of the good faith defense, it seems to me that the provisions which would retain good faith are in themselves counterproductive to the aims of this legislation, which is to lessen the burden on the Federal Government of litigation of this kind. Mr. Taft spoke just a moment ago about the case in which 15 depositions had to be taken of high-level officials of the Department of HEW. I suggest to you that the reason those depositions had to be taken was not because the merits of what transpired were at issue. In almost every case, and I must say, I have litigated these both as an assistant U.S. attorney and in private practice on behalf of injured citizens, the principal facts surrounding the tortious conduct are almost always admitted, or can be easily established by interrogatories or other documentary evidence.

What is the crucial question for which depositions are required is the state of mind of the individuals who are named as defendants. The only way you're going to answer that question is by putting them under oath, which means taking time to prepare their testimony, having them deposed, having it reviewed, and then go forward and have a trial.

Those are the elements that take the time, and by retaining the good faith defense, the Government is inviting more litigation of a kind that it could avoid by eliminating it.

Second, it is also going to be more difficult to settle these cases when you have a good faith defense. The reason I say that is because a settlement in a case like this could be seen as a tacit admission that the individual involved acted in bad faith, and if that is the case, particularly if it's a high official within an agency, the Department of Justice will be very reluctant to settle a case, whereas that would not be true if good faith were simply irrelevant. If the only issue was, as I suggest it really is in most cases, what did the Constitution require or, more likely, forbid, these cases could be easily settled or decided as summary judgment motions.

Now, the second aspect of the good faith defense that strikes me as being highly ironic is that the Supreme Court, in interpreting the constitutional tort provisions applicable to State and local officials in a case called *Owen* v. *the City of Independence,* has decreed that the good faith defense does not apply when the defendant is not an individual but a governmental institution. The result of S. 1775 would be to put victims of constitutional torts undertaken by Federal officials in a worse position than they would be if they were undertaken by State and local officials. It seems to me to make no sense to have a provision of that kind. If we don't need a good faith defense for State and local governments, we don't need one for the Federal Government either.

The second aspect of my meaningful alternative dilemma is the question of attorneys fees. Attorneys fees, as you are probably aware, are often associated with or taken as a substitute for punitive damages. I believe that the bill here is correct in deciding that, on balance, a continuation of punitive damage suits against the United States is not in the best interest of all our citizens. I say this not because punitive damages have never been afforded against the United States. That simply seems to me to be begging the question as to whether we ought to have punitive damages.

But I think, by and large, the punitive damages element would provoke the same kind of litigation that the good faith defense would provoke; that is, questions as to the motive and intent of the individual actor. On the other hand, when we eliminate punitive damages, what we do is to eliminate the additional money that would be available to pay the plaintiff's attorney in cases of this kind, and since, as I've already indicated, most of these cases do not involve a significant amount of money, the effect of denying attorneys fees in these cases would be basically to deny most plaintiffs the opportunity to employ an attorney who could bring the case to court and take care of their grievance.

Once again I would point out that section 1988 of title 42 specifically authorizes attorneys fees in constitutional tort cases against State and local governments, and again I ask: Does it make any sense for the Federal Government to immunize itself in precisely the same cases in which State and local governments are now responsible for attorneys fees?

In light of the continuation of the good faith defense, it seems to me to make no sense to require a plaintiff to come forward and to bring his case all the way to the courts of appeals in many cases with no possibility of any attorneys fees, especially with damages generally limited to the relatively small liquedated damages provided in this legislation.

As to meaningful discipline, it seems to me that an elementary principle of tort law is that the possibility of the payment of a judgment is a significant deterrent to improper conduct. Indeed, the very reasons for enacting this bill seem to embrace that proposition. It is equally elemental that the elimination of the threat of having to pay a judgment by substituting the United States as a defendant for an individual employee will eliminate the deterrent, especially in cases of intentional torts.

We have heard today from Mr. Taft about the absence of any decrease in deterrence as a result of the changes in Federal statutes with respect to drivers and medical malpractice in the Veterans' Administration and elsewhere. Let me say that I consider that the area of negligence there has very little, if anything, to do with the questions involved in constitutional torts, which are principally in the intentional tort area. Obviously, no doctor is going to intentionally act negligently or, indeed, use anything less than the greatest amount of care that he or she is capable of doing. Similarly, drivers of all Federal automobiles, from the Postal Service to the Defense Department, are not so much concerned about discipline or paying judgments in avoiding automobile accidents. They don't want to get killed themselves. You don't need a significant amount of deterrence in that area. Indeed, that's one of the reasons that many States have gone to no-fault automobile insurance.

However, in the intentional tort area, and I'm particularly thinking of invasions of privacy by Federal agencies in law enforcement and elsewhere, we have shown that we do need a deterrent, and I am deeply concerned that S. 1775, by simply providing a referral over by the Attorney General, will not continue the deterrence necessary in the area of constitutional torts, principally intentional ones.

In our view, there would seem to me to be three essential elements of a meaningful alternative deterrent. These include, one, initiation by the victim of the tort of some kind of disciplinary proceeding; two, participation to some degree in that proceeding; and three, review by a higher agency and, in some cases, by the court of the failure to impose any discipline or to impose adequate punishment.

I would also point out that the Attorney General referral remedy is not going to be very much help in those situations in which the malfeasance occurred in the Department of Justice, as it did in a number of cases with the FBI. Nor would it be of any help in cases in which high Cabinet officials are involved or where the White House has been involved in constitutional violations through the wiretap statute, which incidentally, this bill would also effectively repeal as far as civil remedies are concerned. It seems to me that the inadequacy of the deterrence here is a grave factor to be weighed in considering whether the mandate of the *Carlson* case is adequately satisfied so that there is a proper alternative.

I have one final point to make. All of the cases that you have heard about and will hear about will doubtless continue to be brought regardless of whether the United States is substituted as defendant. The principal questions that this committee needs to address in that connection are who should be the defendant, what should be the scope of the litigation, and if we have moved some of the inquiry about good faith away from the courts, shouldn't we move it into the administrative agencies where the procedures are less cumbersome, where the real purpose of the inquiry is to determine whether we should discipline within the scope of our disciplinary system.

We are anxious to work with this committee as we've worked with the Department of Justice and committees in the Senate and the House of Representatives in the past on this most important legislation, but we urge the committee not to rush forward. We have previously heard pleas that imminent action is required, and yet 4 years have taken place without it. This is an important area and we urge the committee to go forward, but with appropriate caution and with significant modifications of S. 1775.

Thank you very much.

Senator **Grassley**. I want to thank you for your testimony and your offer to sit down and work with us. In fact, I was going to invite you, as I did the American Civil Liberties Union, to sit down with me and/or my staff to thoroughly review this legislation.

I would like to take one note of exception, though, that you have, in your written testimony that S. 1775 would provide nothing toward achieving the goal of deterrence. I guess I could say that I disagree with you on that point. The prospect of disciplinary action as initiated through the agency and particularly if the conduct is criminal, the possibility of criminal prosecution will be sufficiently strong to discourage improper conduct.

I don't think that we should lose sight of the fact that although the lawsuit causes people to be immune, a lawsuit against the United States would still require a probe into the employee's conduct, and of course this was brought out in last week's testimony. But, I would like to think that the integrity of one's professional reputation being on the line, whether in disciplinary action or in a suit against the individual or in a suit against the United States standing in for the individual, would be a significant deterrent. I don't think that the prospect of damaging one's professional reputation should be taken lightly or, hopefully, isn't taken lightly by individual employees.

Mr. **Morrison**. Well, I would have two statements in response to that. First, the criminal liability exists quite apart from S. 1775, and I simply meant to say, and perhaps could have been more precise, that S. 1775 adds nothing to potential criminal liability and that, of course, is true, whoever the defendent may be in a civil case.

The second point I would make is that one of the problems that we have encountered in the past is that violations of the constitutional rights of individuals have often not been the result of decisions of individual low-level employees, but have been the result of policies, constitutional violations that have come from the highest levels within the departments, thus providing a referral over to the Attorney General, particularly for people who have long since left the Government or were high officials to begin with is simply not going to provide any kind of meaningful deterrence.

Furthermore, the Department of Justice has taken the position that even where there have been findings of constitutional violations, it will not disclose to the public the nature of the punishment, if any, that has been meted out in internal disciplinary proceedings. I would submit to you, Senator, that if the public doesn't even know what the results of these proceedings are, it's hard to have much faith that the process is working in the way that you have envisioned.

I guess that I would say that I have a little less confidence that there are not going to be more coverups than you do, and I feel that the balance is tipped too far in one direction rather than the other.

Now, this is a point on which reasonable people can differ, and I would like to engage in a debate about that with you and your staff. There has been much drafting done to remedy these problems, drafting that was approved by the Department of Justice. Indeed, I think the FBI and the CIA even went along with it in the last administration when they saw all the arguments spread out on the table before them and saw what the proper balances were. We think that striking an appropriate balance is important and we don't think that S. 1775 does that at this time.

Senator **Grassley**. Following up on the line of your major objections to this legislation dealing with the good faith defense as well as the aspect of attorney's fees, and your saying that this particular bill is deficient more so than the ones that were before previous Congresses. Specifically what provisions in prior bills were you more comfortable with?

Mr. **Morrison**. Well, there were two. I would be glad to supply the committee with the specific text, but basically it said there shall be attorney's fees in cases in which there is a finding of constitutional tort. The second was that the United States shall not have available to it the defense of the good faith of the employee as a defense to it in a claim of constitutional tort, just as the United States does not have the good faith available to it in a common law tort. It would simply treat them the same. And part of my position is that the more you can treat them the same in that respect, the less litigation you're going to have.

The language is not very difficult to draft; it's quite elementary and it's been in a number of bills. I might say that this language was not in the first set of bills that were introduced by the Carter administration at the beginning of the 95th Congress. It only came about as a result of our discussions and of hearings and testimony and further reconsideration.

Senator GRASSLEY. That's all the questions I have at this time and I want to thank you very much for your testimony and I'll look forward to sitting down with you in the future.

Mr. MORRISON. Thank you, Senator.

Senator GRASSLEY. Thank you, sir.

[The prepared statement of Mr. Morrison follows:]

PREPARED STATEMENT OF ALAN B. MORRISON

Mr. Chairman, members of the Committee, I am pleased to appear today on behalf of Public Citizen, a nonprofit, public interest organization, to discuss S. 1775, a bill which would amend the Federal Tort Claims Act to provide that the exclusive remedy for constitutional torts shall be against the United States. I have personally been involved in the legislative debates over this subject over the past four years, and I have litigated tort claims as an Assistant United States Attorney on behalf of the United States, and as a private attorney in claims against officers and employees of the United States.

Our basic position with respect to S. 1775 is that we are firmly opposed to it because the tradeoff proposed is fundamentally unfair and counterproductive to the enforcement of constitutional rights in this country. Contrary to the position taken by the Department of Justice (p. 1), there is no "continuity" between the position taken in this bill and that taken by the prior Administration. This legislation presents a major departure from the legislation which the Carter Administration had supported in three important respects: (1) the bill would retain the good faith defense when the United States is the defendent; (2) no attorneys fees would be awarded for constitutional torts; and (3) no meaningful disciplinary procedures are included as a deterrent against unconstitutional acts, as a substitute for the current law under which the potential for damage awards plays that role. Each of these three departures is vital, and unless all three are corrected, we cannot support the legislation.[1]

Background

At the outset, let me be clear about certain matters. Public Citizen agrees that the United States, and not individual employees, should bear the ultimate financial responsibilty for constitutional violations. Such a change in law would (a) provide improved compensation for victims, (b) with elimination of good faith defense, decrease the amount of litigation by reducing the number of issues and improving the possibility of settlement, and (c) eliminate potentially large judgments against salaried employees of the United States. Nonetheless, the desirability of substitution of the government as the defendant must be balanced with the need to assure that a reasonable alternative is available for victims of constitutional torts and a reasonable deterrent continues for employees who engage in unconstitutional acts. The problem with S. 1775 is that it is almost totally one-sided.

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[1] The American Civil Liberties Union has raised a number of powerful constitutional objections to S. 1775. They provide a further basis for opposing its enactment.

By way of further background, we wish to note that the Carter administration introduced a bill not dissimilar to S. 1775 in the early part of the 95th Congress (H.R. 9219 and S. 2117). Like the Justice Department's assertions about this legislation, the Carter Justice Department contended that there was a major problem which needed immediate rectification. Public Citizen, along with a number of other groups, most particularly the American Civil Liberties Union, pointed to a large number of problems which demonstrated that the balance struck by that proposal was unacceptable. A number of compromises were reached which are reflected in subsequent proposals made by the Justice Department in hearings before the Judiciary Committees in both the Senate and the House of Representatives in 1978.

Early in the 96th Congress, a new bill (H.R. 2659 and S. 695) was introduced that cured many of the major objections that we had to the prior bill. Nonetheless, despite the aura of crisis in both the 95th and 96th Congress, the bill was allowed to die without any significant attempt to shepherd it through. In this current Congress, it was only after more than nine months had passed that either House held any hearings on the proposed legislation. Thus, while there may be a clear need for better solutions to the problem of federal employees involved in constitutional torts, it is equally clear that there is no real urgency about solving the problem. As in the past, we are willing to work with this Committee to solve these difficulties, and, by way of illustration, I believe it is fair to say that it was our efforts that led to a means by which the problem of substitution in pending cases, which is now embodied in Section 10 of S. 1775, was conceived, thereby eliminating a potentially troublesome constitutional question relating to the denial of the right to a jury trial.[2]

Good Faith Defense

The purpose of the good faith defense in constitutional torts, as enunciated by the Supreme Court in various decisions applicable to state, local and federal officials, is to prevent officials from being unduly timid in carrying out their responsibilities out of a fear of possible tort liability. *See e.g.*, *Butz v. Economou*, 438 U.S. 478 (1978); *Wood v. Strickland*, 420 U.S. 308 (1975). Nonetheless, this purpose clearly sacrifices the victim of a constitutional violation since the victim is denied the recovery despite the wrong inflicted on him or her. While such a balance may be acceptable if the defendant is an individual employee, the Supreme Court recognized in *Owen v. City of Independence*, 445 U.S. 622 (1980), that there was no comparable rationale to apply when the defendant was a governmental unit. Since that is now the law with respect to state and local governments, it would be ironic indeed if our citizens could expect *less* protection when federal officials were the ones who were violating their constitutional rights. In our view, the Justice Department's position to the contrary, which curiously omits any reference to Owen, should be rejected because it fails to focus on the fact that different defendants are involved when it is the United States, not the individual employee that is financially responsible.

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[2] We note that the same problem with respect to the denial of punitive damages in pending actions has not yet been rectified. The failure to do so will, we fear, only generate litigation, and the small price that has to be paid for treating punitive damages the same way as the jury trial, seems slight considering the overall aims of the legislation.

The refusal to eliminate the good faith defense will also increase the cost of litigation and interrupt the effective operations of government agencies. By permitting the good faith defense to continue, it will be necessary in every case to depose the individual who is alleged to have violated the plaintiff's constitutional rights (and perhaps others on whom that person relied) in order to probe his or her state of mind. Moreover, in all probability a trial will be required on the issue of motive. Furthermore, a government agency is much less likely to settle a case if doing so may be seen as tacit admission of bad faith on the part of an agency official. Such a tendency is particularly true at the administrative level where it is the agency that must decide whether to accept a settlement.[3]

We also believe that the inclusion of the good faith defense is particularly harmful where the right to punitive damages is eliminated. Thus, despite a finding of malice, a victim would not be permitted to recover punitive damages, a result which may make sense if, in the overall scheme, the employee's good faith defense is irrelevant, but not where good faith continues to be a defense when the United States is the defendant. Furthermore, we note that section 9 of S. 1775 eliminates the civil damage remedies in 18 U.S.C. § 2520 for unlawful wiretaps, most of which would involve constitutional torts under the Fourth Amendment. We further note that the good faith defense under section 2520 is an extremely limited one -- reliance on a court order -- but that limited defense would obviously be greatly expanded with the elimination of liability of federal officials under section 2520.

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[3] We note that section 2(3) of S. 1775 requires the Attorney General to approve the administrative settlement of all constitutional tort claims, whereas the normal procedure requires such approval only where payment is made for more than $25,000. We see no reason for this unnecessary burdening of the Department of Justice and denigration of the agencies.

Absence of Attorneys' Fees

The refusal to grant attorneys' fees for constitutional torts places the federal government in striking contrast once again with state and local governments who are liable under 42 U.S.C. § 1988 to pay attorneys' fees for constitutional violations and indeed for violations of other federal laws. This second class status can hardly be defended on any policy grounds. Nor are attorneys' fees under federal law unique for constitutional violations, as the wire tap provisions cited above demonstrates. Indeed, the Carter Administration recognized the desirability of attorneys' fees in these kind of cases and readily acceded to provisions including them.

While it is true that the government has not normally paid attorneys' fees under the Federal Tort Claims Act, constitutional rights are different and require different protections. Indeed, the necessity of having liquidated damages demonstrates the difference, but those damages, because they are quite modest, can hardly be a sufficient incentive for an attorney to bring a complicated case which may well require extensive litigation in both the trial and appellate courts. Contrary to the Justice Department's assertion (p. 9), constitutional torts cannot be simply manufactured by clever pleadings and, to the extent that they can, the liquidated damages provisions may cause that phenomenon to occur in any event. Finally, we note that even where bad faith is shown, there will be no attorneys' fees. This denial of a fundamental incentive is wholly inconsistent with the importance of the rights at issue, and the Committee should insist that attorneys' fees are provided in cases of this kind.

Elimination of Deterrence

Most serious of all, the dramatic loss of deterrence in S. 1775 affects all Americans and not simply victims of constitutional violations. The current law creates a significant incentive for compliance with constitutional rights because individual federal employees have a substantial fear of having to pay judgments and attorneys' fees in lawsuits against them. That deterrent has been wholly eliminated by making the United States exclusively liable and by failing to include anything comparable to replace it. As a result, S. 1775 creates a significant disincentive to obey the Constitution. It is a well recognized principle of tort law, and indeed one of its aims, to deter violations and yet S. 1775 would provide nothing toward achieving that goal. In our view, the fear of large judgments and significant attorneys' fees is vastly overstated under the current situation, but to the extent that they create problems, they can be readily solved by obtaining liability insurance as other professionals do and indeed as policemen and, we have recently read, judges are doing, to guard against these contingencies.

Nonetheless, despite our views that the concerns of the Department are overstated on this matter, we might be willing to accept the loss of a dollar deterrent if meaningful alternatives were provided. In our view, the requirement in revised section 2679(f) (section 5(d) of S. 1775) for the Attorney General to refer matters back to the employee's agency, with nothing beyond that, is simply insufficient because it tips the balance wholly against deterrence.

As we see it, three essential elements are required in any meaningful substitute for the current deterrent of possible judgments for actual and punitive damages: (1) the right of the victim to initiate an investigation which cannot be terminated without adequate reasons; (2) the right of the victim to participate in an appropriate manner in the investigation and subsequent disciplinary proceedings, if any; and (3) the right of the victim to agency, and ultimate judicial, review if no punishment is meted out, or if the punishment is wholly inadequate for the violation.

While there is considerable room for debate as to how each of these three disciplinary principles will be carried out, there is no room, in our view, for any proposal which does not include these basic elements. Indeed, the current system is so seriously defective that the government will not even make public such basic information as who has been disciplined for known constitutional violations (principally, black bag jobs) and what type of punishment, if any, was meted out. S. 1775's reference over by the Attorney General will do nothing to change that situation and is for that reason wholly unacceptable.

We recognize that proposals to create meaningful alternatives are not easy to draft, but they can be done. We have worked with the Department of Justice in the past and with Committees of both Houses of Congress on this task, and we are more than willing to continue to do so. But let us be clear about one matter: the inclusion of meaningful alternative deterrence in the form of a different kind of internal agency disciplinary proceeding is the sine qua non for making the remedy for constitutional torts exclusively against the United States.

Other Points

We are pleased to note the amendments in section 4 that would alter 2679(d)(4) and (5) by providing significant relief from statute of limitations problems when the plaintiff erroneously sues an individual employee. This is a welcome advance in the cause of justice. Cases such as Wollman v. Gross, 637 F.2d 544 (8th Cir. 1980), which result in a total miscarriage of justice, simply cannot be allowed to continue, and we fully support these provisions.

On the other side, we find troubling the conclusive certification by the Attorney General, not subject to judicial review, that an employee was engaged in conduct within the scope of his employment. That certification operates to create exclusive liability in the United States, but with the other unfair balances struck in the proposed amendments, may seriously prejudice tort victims. While we do not encourage the Committee to enact a provision which would permit extensive litigation over the scope of employment, we do believe that the right of the Attorney General, in effect, to decide for himself what constitutes the scope of employment is a further indication of the unfairness involved in this bill. We also believe that the scope of employment test ought to be extremely broad in this context, assuming the remainder of our objections are taken care of, so that the only time that a victim does not have the benefit of the deep pocket of the United States is when the employee was plainly acting outside of the scope of his responsibilities, such as an off-duty law enforcement official engaging in an assault of his neighbor for purely personal reasons.

Finally, the Committee needs a definition of the phrase "tort arising under the Constitution of the United States" in section 3(b)(1) of S. 1775. We are concerned by the modifying phrase in new section 2674(b)(1) which limits such a tort to one which is "recognized or provided by applicable Federal law" because the language seems to suggest that if the tort is not currently recognized, there would be no recovery. Thus, there would be no future evolution of the law of constitutional torts, and hence that concept would be unduly narrowed. We recognize that the potential that constitutional torts have for swallowing up a large number of ordinary torts, but we believe that there are better solutions to that problem. As in the past we stand ready to work with the Department of Justice and the Congress on it. Our principal point is that it is irresponsible for

Congress to proceed unless such a definition of, or more properly a sensible relation is created between, constitutional and nonconstitutional torts.

CONCLUSION

Whatever the merits of the general principle may be that the remedy against the United States should be exclusive when the wrongdoing is that of a federal employee, it requires meaningful alternative remedies and adequate deterrence to prevent wrongful acts by federal employees. Because S. 1775 does not meet these prerequisites, we cannot support it. We do, however, stand ready to work with the Committee to provide a bill which would meet these standards in the manner outlined above.

Senator **Grassley**. Dr. Marvin Schneiderman is our next witness. I understand that you are—would you like to come to the witness table? I understand that you are a senior science adviser with the Division of Life Sciences at Clements Associates. In 1979 you were sued personally for statements which you made in your capacity as Assistant Director of the National Cancer Institute, Division of Science Policy. We thank you for taking the time to appear before us today and to share with us your experience with this problem that S. 1775 deals with.

Please proceed.

STATEMENT OF MARVIN SCHNEIDERMAN, STATISTICIAN, FORMERLY WITH THE NATIONAL CANCER INSTITUTE, BETHESDA, MD.

Dr. **Schneiderman**. Thank you, Senator Grassley, and I'm pleased to be here with you today. I have no formal statement but I'll try to tell you informally the background to my suit and then my reactions to it.

I was trained as a statistician and I have an undergraduate degree from City College of New York and then eventually I received a Ph. D. degree in statistics from the American University here in Washington after having spent a year as a Rockefeller Public Service Fellow in the London School of Hygiene and Tropical Medicine. My work in statistics has been almost exclusively in the field of biology and medicine. My doctoral degree was on a mathematical technique for reducing the amount of experimentation necessary in human experiments in order to achieve statistically significant results, convincing results, in evaluating new treatments for disease.

I was at that time particularly interested in experimentation relating to the treatment of cancer and very much concerned that excessive experimentation on humans should not occur.

I'm a member of a large number of scientific societies and an honorary fellow of several of them and I've attended a large number of universities as a student. That sounds as if I were a bad student and got kicked out, but I really didn't.

I came to the Federal Government in 1940 as a clerk in the Census Bureau. Including my military service, I had 40 years of service in the Federal Government. I left the Census Bureau to go to work for the—to go into the Army during World War II. I was in the Air Force. I eventually was discharged as a first lieutenant, and after a short civilian service with the War Department I joined the National Cancer Institute in 1948 as a research statistician, as an adviser to the research scientists. By the time I had left the National Cancer Institute in 1980, I had written an inordinate number of scientific papers, which I don't think hardly anyone is ever going to read. But I was, by that time, I had been the associate director of the Institute for Field Studies and Statistics. That's epidemiology and statistics, the causes and course of disease in humans. Then eventually, in my last position, I was the associate director for science policy.

In that position it was my function essentially to be the spokesman for the institute on scientific issues in discussing things, as it were, with the general public. I often substituted for the director of the institute on those issues. Talking with the media, for example, I was on "60 Minutes" and several other TV programs.

It was because of these last two jobs that I got involved in this particular law suit. The issue of the suit was related to the artificial fluoridation of water supplies, to reduce dental caries. Fluoridation has been opposed by many people in this country, I think out of good faith and in complete honesty, for various reasons. At one time it was opposed because the fluorides were said to be rat poisons and we shouldn't give people rat poison. At another time there was a small group of people who were opposing fluoridation, arguing that it was a technique for poisoning people of the United States and really it was a Communist plot. I don't think people paid much attention to that.

In the middle seventies my staff at the Cancer Institute pulled together all the data on mortality from cancer in the United States by county, for every county in the United States, for the period 1950 through 1969. It's a monumental piece of work. The resulting publication is thicker than the Manhattan telephone directory.

Following our publishing this book, a group of people who were opposed to fluoridation used these data to demonstrate that the cities which had fluoridated water, had higher cancer rates than cities which did not have artificially fluoridated water. From a scientific point of view what they had done was a rather poor piece of work. They hadn't looked at the fact that these cities had higher rates before fluoridation and not just higher rates afterwards. They had not looked into the fact that the age/race/sex compositions of these cities was different than the age/race/sex compositions of the unfluoridated cities. They didn't look into the fact that the fluoridated cities were largely in the Northeastern part of the United

States, which has higher cancer rates, than other parts of the country, particularly the Southeast, which in the past, being largely agrarian and agricultural, had very much lower cancer rates. There were all these rather obvious and substantial flaws in this particular piece of work.

We called this to the attention of the people who had done this work. We said that what you've done was inappropriate and here are the things that you've neglected to do. In part, my staff found that they were providing an education in epidemiology, as it were, in epidemiologic techniques, to the people who were presenting these data. Some of these data, by the way, were placed in the Congressional Record, in the original flawed form in which they were produced.

One of the people who eventually became involved in this was a man who had been on the staff of the National Cancer Institute, whom I had known was a biochemist of international reputation, and for whom my colleagues had provided statistical services and consultation while he was on the staff of the National Cancer Institute.

Some of this work was then corrected, done in a better fashion, and again material placed in the Congressional Record along with charges that the Public Health Service, and the National Cancer Institute and my staff, were covering up the "fact" that fluoridation, a policy that the Public Health Service had indicated was useful in preventing dental caries, was killing 35,000 people a year in the United States and that we in the Cancer Institute were engaged in a coverup of this killing of 35,000 people and we were rather nasty, venal people.

We didn't look upon ourselves as nasty, venal people. In fact, we were rather shocked by this. We again indicated the flaws we saw in the arguments that were presented, bad epidemiology, bad work being done, and we let it go at that. We did not specifically make detailed item-by-item reply to the material produced. Instead people working for me, being first-class scientists, said, "OK, let's look at this problem as a scientific problem and let's do a good scientific job and see what we come out with." They did a thorough job. It took them about a year or so to do it. They did a thorough job and came to the conclusion that fluorides did not cause any increase in cancer and, in fact, if anything, the areas that were fluoridated when the appropriate things were taken into account, seemed to have slightly lower overall death rates, probably some small reduction in heart disease, intriguingly. Whether this is true or not we don't really know. We made no claim that this was so, but if anything, if fluorides not only were not harmful, they appeared to be possibly helpful not only in preventing caries, but perhaps in some other illnesses.

Along about this time, a suit was instituted in a suburb of Pittsburgh in which the local water board had indicated their intent to fluoridate the water of the suburban district and one of the residents of the district brought suit to prevent this.

The Director of the Cancer Institute was asked to testify in relation to this suit because, among the charges in the suit, was that fluorides caused cancer, much as the earlier work by the group that we had criticized had indicated. By this time the group had listened to our criticisms, and had improved their work, but it was still inadequate.

The Director asked me then to substitute for him as I normally did for these kinds of things, this being a public issue and one of my functions was to, in a sense, talk with the public. I testified in this trial which lasted from March through July in 1978. Eventually a decision was handed down about the end of October or beginning of November, in 1978. The decision was in favor of the plaintiff, supporting his request that fluoridation should not take place because it was hazardous in that it caused cancer. This shocked me. Frankly, I was very surprised. I thought we had done a good job in presenting to the judge the scientific issues that were involved and I was surprised at his decision.

I was interviewed by several newspaper people, the Washington Post, the Science News, and others, and I said to them essentially the things that I thought that I had said at the trial, and that was that the work, we thought, was inadequate, that it had not proved the case, and this was my statement. This appeared in the Post. The article in Science News also carried the further remark that I had made that scientists had better look to how we talk with the public because if we can't convince an educated person, a judge, in a case such as this where a great many of the scientific experts in the field had testified, then we obviously were not doing a very good job in explaining our case, and that we'd better look to what we were doing to see how we could do a better job.

That, as I say, was in November 1978.

In March 1979 I was then sued by one of the participants in this particular suit, one of the people who had presented evidence on the other side, Dr. John Yiam who is a biochemist, and who was the scientific director for a group called the National Health Federation, a group that's concerned with freedom in medicine and freedom in medical care. Among other things, this group is opposed to fluoridation because they assert it invaded personal rights, private rights, constitutional rights to drink pure water. This same group was also prolaetrile and has taken on several other issues of that sort.

Dr. Yiam also sued the Consumers Union of the United States about the same time for having published five articles on fluoridation which came to essentially the same conclusions that I had, that the work arguing that fluoridation was cancer causing, a cancer-causing process, was not true, and that the work coming to this conclusion was inadequate.

I was sued first for one-half million dollars for libel on two counts of one-quarter of a million dollars each. That was then changed to one count of one-quarter million dollars. To say that I was surprised or shocked by this is to put it mildly. It seemed to me that I had behaved both as a responsible public official both in bringing the official position of the Cancer Institute and the Public Health Service into the court and also in talking with the public, the public in this case being newspaper people. In addition I also thought that I had behaved as a good scientist in two ways. First, by attempting to demonstrate to the people who were producing these arguments the difficulties that they were having, the flaws in what they had put together, and then eventually indicating the flaws in the courtroom and then repeating this to both a general publication, the Washington Post, and the Science News, a semiscientific publication.

I was sued as a private individual, not as a member of the Federal Government. There was some discussion with the General Counsel in the Department of HEW and then with the Justice Department as to whether this was appropriate. It was eventually decided that I had acted in an official capacity so that it was appropriate for the Justice Department to defend me, which the Justice Department then did.

The case dragged on for quite some time, during which time I found myself doing a substantial amount of work, essentially preparing, or helping prepare, a defense for myself, helping to line up witnesses having in the back of my mind the continual fear that if, in presenting the case to a judge, which scientists of high quality had presented the material and we had not been able to demonstrate what we thought was an open and shut scientific case, would we have similar difficulty in presenting such a case to a jury who were perhaps not so well educated, perhaps not so well informed? To say that this left a residual fear in my mind is to put it mildly. I was concerned. I was worried. I developed, during the course of this preparation, several boxes of files, of papers on the issue. During this time several people came to see me about whether I would like another job. I was approached by another Federal health agency and asked if I would be interested in the job of Deputy Director for Research for that agency, and I put them off. I said, "I don't think I can do a good job for you at this time, I'm so involved with this particular suit. I'm spending so much time in relation to it."

I was approached by a couple of private firms here in the Washington area asking that I join the staff. They knew that I'd been working for the Federal Government for a long time and that if I might be considering retirement they might tempt me into retirement if they offered me something very nice, and again I put them off. I said, "I don't think I could do the job for you at this time in view of what's going on with me."

What I eventually found was that I apparently got so involved and so concerned with this issue that it turned out to be the best weight-reduction program I've ever gotten involved in. I lost about 10 or 12 pounds. My wife thought I looked elegant. She said, "That's what you looked like when I married you," and I suppose that was a positive effect. It also had negative effects. I have mild angina and, by gosh, I found I wasn't having mild angina. I was having chest pains frequently at night. I would wake up with chest pains. I went to see my doctor and he said, "Oh, yes." He said, "That's the standard thing. You get a high anxiety level and you get chest pains from angina. I guess I'd better give you sleeping pills." So for the first time in my life I was taking sleeping pills.

Having worked in medical research almost all my professional life, I'm very conservative about taking medication and that was an unusual thing for me to do.

A couple of other things happened that I found surprising and shocking. Some of my colleagues, to my surprise, assumed that I really must have done something wrong. Otherwise, how do you get sued? "Schneiderman, you just must have done something you shouldn't have done. Otherwise you wouldn't be sued. People don't sue capriciously. You must be guilty." This was really a shock to me. I really was surprised. I really was disturbed by this.

At this time I was working from time to time with Mr. Califano who was the Secretary of the Department, both on our asbestos policy and on radiation and health. I had to miss some meetings with Mr. Califano because I was spending time with the lawyers at the Justice Department. I was also working with Dr. Frederickson's staff. Dr. Frederickson was Director of the National Institutes of Health. We had gotten involved in the Three Mile Island problem at that time and the health effects, and I was on his committee on that. I had to miss several of those meetings in which we were trying to assess the health effects of the Three Mile Island accident again because of my need to work with the lawyers.

So, all these various things occurred as a result of this particular suit. I was not doing my job as I thought I ought to do it, as I had done it in the past.

One other sort of spillover in relation to this, about 2 or 3 weeks ago I got a telephone call from Scotland where a trial is now underway as to whether a local district, again, Strathclyde, just outside Glasgow, should fluoridate its water. The trial has been going on over a year. It's, I am told, the longest civil trial in Scottish history. The general counsel from the Strathclyde District asked me to come to Scotland and testify on fluoridation and its safety. I said, "I'm no longer a member of the Federal Government. I left in 1980. This is something the Federal Government, the Cancer Institute, did. You should get someone from the Cancer Institute to come and testify. This is an official public health issue, a public health problem.

He said:

> I have attempted to. I have called the Director of the Cancer Institute and everybody on down the line, including the people who had worked for you and produced this report that you had talked about in response to the earlier studies. Not one of them is willing to come and testify here. They just don't want to get involved in the kind of thing that you got involved in, and I cannot get anyone to come and testify.

Just before I left the National Institutes of Health I wrote a memo to the Director of the Institutes and I said this looked to me as if it was going to be a continuing problem and since it was an official policy both of the Public Health Service to advocate fluoridation and of the National Cancer Institute to demonstrate, as we had, or we thought we had, that fluoridation was not a health problem and that it did not increase cancer, that some official action ought to be taken within the Institute to see that testimony could be given when the issue arose. I got back a very pleasant memorandum from the Director of Dental Research, who said, "Yes, this is a good idea." But nothing more, so far as I know, came of it, leading me to believe, again, that people are very reluctant and very hesitant to get involved in the kind of thing that I got involved in.

I don't know that there's much else to tell you in relation to this issue. I was gray before this particular thing happened. It did not cause my hair to turn gray. That's genetic.

Senator **Grassley**. I want to ask you some questions if you will pause a moment.

You were in Government service 40 years?

Mr. **Schneiderman**. Yes.

Senator **Grassley**. Did the suit have anything to do with your leaving the Cancer Institute?

Mr. **Schneiderman**. It may have. You know, I was there 40 years. I had a very interesting job. I was the liaison, as it were, between the scientific community and the general public and, frankly, I enjoyed that very much.

I think maybe the spillover from the suit, some of my colleagues' attitudes, my fellow scientists, that, "You must have done something wrong," and their looking at me rather askance from time to time may have pushed me toward leaving, toward deciding, "You know, Marvin it's about time for you to get out of here. These people don't really trust you any longer." I think it may have had something to do with my leaving.

Senator **Grassley**. You expressed how it affected your work, for example, you mentioned the word "residential fear." You also spoke to the fact that some of your colleagues, and this is something you just found out within the last month, you said, that your colleagues have not wanted to testify in Scotland because of fear that they might get as involved as you did in some sort of suit. Is there any other example that you could give us of this problem you had foisted upon you affecting coworkers?

Dr. **Schneiderman**. Well, very quickly, all of the Institute knew about the suit and the Office of the Director and so on, and I've very often found myself involved in discussions with people who said, "Well, you know your job, Schneiderman, is to do research. That's really what you should have done. Had you been a scientist and just stuck to doing research, you wouldn't have gotten involved in this," and several people had said to me, "I'm going to do my research and stay in my lab. Nobody is going to get me involved in these kinds of things."

So that, although these were people who probably in the course of their professional and academic lives, because the National Institutes of Health is really an academic institution, would rarely get involved in this kind of thing, I think it said to some of them, "Stay away from the reporters. Stay away from courts. Stay away from public issues." Scientists are very reluctant to talk to reporters. Scientists always believe that some way or other the reporter doesn't do an accurate and complete job. I think my problem reinforced many of them.

I find that extremely unfortunate, particularly for Federal Government scientists. I think it's important that we talk to reporters, that we talk to the general public, that the taxpayer know how his money is being spent. I think we've got to do this.

Senator **Grassley**. What's the status of your suit now?

Dr. **Schneiderman**. The suit was dismissed. It was dismissed in February 1980.

Senator **Grassley**. OK. Did the plaintiff in his suit against you allege any constitutional violations or was the suit against you based upon libel statutes?

Dr. **Schneiderman**. It was based upon libel statutes.

Senator **Grassley**. Do you currently have any insurance to protect you in your work with Clements Associates?

Dr. **Schneiderman**. No, I don't. It would be extremely unusual for a scientist to have insurance in this particular area.

Senator **Grassley**. Maybe there's none available. I don't know.

Dr. **Schneiderman**. I don't know of any available. My wife is a professional person in a related field and she has just gotten insurance in her field and I will, within the next several days, talk with her agent to see whether they could write something covering me.

Senator **Grassley**. You haven't had a chance to hear or read one of the witnesses' testimony today. Mr. Clark, in his written testimony on page 4, states that advocates of this legislation have painted a picture and I quote from words that he used, "of cowed bureaucrats." They state that it is hard to believe that the level of risk of potential lawsuits functionally paralyzes any conscientious Federal official.

You have already commented to some extent on this but would you have any further reaction? Because I think I get the impression from you, reading between the lines, that it really does interfere with the work.

Dr. **Schneiderman**. Yes, well, I'd say that Mr. Clark apparently was not in a position that I was in. Certainly it interfered with my work. I'm not an easily cowed person. And yet I found that I was waking up at night and saying, "Now, how would I defend myself if this were said? How would I defend myself if that were said?" And then I'd spend half the next day going through the literature and pulling stuff together to provide a case for myself, as it were, to defend myself against this hypothetical question that I had come upon at 2:30 in the morning.

I did not, I must say, in my last several months or last 6 to 9 months at the Cancer Institute, I don't think I worked up to the level that I had worked up to before. I don't think I did as good a job as I could have. There were certain things I know I wanted to do for the Director at that time. There were some very serious policy issues that I wanted to follow up which I just didn't do.

Senator **Grassley**. I'd also like to have you comment on another statement of Mr. Clark's, and I quote, "We doubt that a Government attorney expends much time or energy holding the hands of Federal defendants in *Bivens*-type cases or actions," unquote. Of course, in conjunction with that statement, we had testimony last week by U.S. attorneys who testified to the contrary, that they spent a great deal of time working with cases like this. In the words of one attorney, an inordinate amount of time. I'd like to have your comments.

Dr. **Schneiderman**. Well, I don't know what an inordinate amount of time is, that people devoted to my problems. If they devote all their time to my problem I still think that's not inordinate. That's ordinate. That's what they ought to be doing.

I found that the U.S. Attorneys Office people here were thoughtful and helpful and did spend a great deal of time with me. I'd come down from Bethesda, maybe once or twice a week in the beginning, and then once or twice a month later on, and they spent a lot of time with me. They obviously were spending time preparing things on, I recall at least one or two occasions, on weekends and holidays, so they've something to present to the court on Monday.

As for holding hands, my attorney was a woman and she didn't hold hands with me. She was a very attractive young woman, by the way. But she did spend a lot of time talking with me, listening to my telephone calls, my telling her, "You know, I'm upset by this; I'm frightened by this; this has never happened to me before," and she did her best to be not only attorney, but I think, an amateur psychiatrist.

Senator **Grassley**. Thank you very much for your sharing with us your experiences with the problem of a Federal employee being sued and for your helping us with this legislation. We appreciate it very much.

Our next witness is Mr. Jerry Shaw, president of the Senior Executives Association.

Mr. Shaw, I understand that you are here today to speak on behalf of career members of the Senior Executive Service. Please feel free to highlight your testimony as you see fit and proceed.

STATEMENT OF G. JERRY SHAW, PRESIDENT, SENIOR EXECUTIVES ASSOCIATION; FORMER DIRECTOR, GENERAL LEGAL SERVICES DIVISION, OFFICE OF CHIEF COUNSEL, WASHINGTON, D.C.

Mr. **Shaw**. I will do that, Senator. Thank you for the opportunity to be here. I am the president of the Senior Executives Association, which is a voluntary professional organization that speaks on behalf of career members of the Senior Executive Service and Supergrade Executives.

To lay a little background, I would like to point out that prior to my becoming the president of the Senior Executives Association, I was the Director of the General Legal Services Division in the Office of Chief Counsel, Internal Revenue Service. I supervised some 60 lawyers in that organization and around the country. One of our primary responsibilities was defending against constitutional tort actions, brought against IRS executives under the *Bivens* theory and the *Carlson* v. *Green* theory. Before I left there earlier this year, I had cause to count the number of these kind of cases that had been brought against IRS executives and employees last year, and it was nearly 500 cases just in the Internal Revenue Service alone.

Most of them were done away with by motion for summary judgment or motion to dismiss because they were so patently absurd. But, they certainly took a tremendous amount of time of the lawyers that I was responsible for supervising.

The Federal executive today is beset by numerous obstacles in performing effectively the work of the public service. While this is my first time to testify before this subcommittee, I have appeared before several other committees of both Houses on a host of issues that impinge on the daily management of the Government's programs.

While many other issues such as restrictions on Federal pay and Senior Executive Service bonuses are receiving widespread attention in the press, I know of no issue which strikes more viciously at the morale of Federal managers and executives than the knowledge that they may be personally sued for actions performed within the scope of their jobs. Those suits may be as serious as violations alleged in areas where the law is unclear, or they may be as trivial as allegations solely for the purpose of embarrassing a public manager, and there are many, many of those.

The fact that only 9 of some 1,500 cases brought against Federal managers have resulted in judgments against the defendant suggests that most cases are marked by such trivial qualities. There have been many more than 1,500 cases brought. My understanding is that there are 1,500 pending right now.

The knowledge that your employer may choose to disassociate himself from your defense considerably alters the enthusiasm one has for management. There are those who argue that such threats are necessary to produce a chilling effect on the arbitrariness of otherwise unchecked Government administrators. We suggest that the evidence of such arbitrariness is rare, that other administrative procedures exist to correct and punish such caprice and that the present laws result not in prudent management, but in supine Federal administration whenever the limits of the law are fuzzy.

As you are aware, the Congress expects the agencies to be ruled by its intent as well as by its laws. Such opportunity for interpretation produces areas of uncertainty that still require executives to act.

I attack head-on any suggestion that the possibility of suit against individual Federal employees personally is necessary or desirable as a guard against improper action by Federal employees. I know, for example, of no evidence that drivers of Federal vehicles have become more accident prone since they received statutory immunity in 1961 or that various categories of federally employed medical personnel became less dedicated or less able after various statutes provided immunity to them in 1965–70, and 1976. In response to the prior statement by Mr. Morrison, one doesn't want to get killed in an automobile accident, but I don't think the same concern exists for medical personnel.

There are adequate existing controls on the acts of Federal employees today without needing the threat of a personal lawsuit. I believe that to almost all Federal employees the accountability to supervisors which governs assignments, evaluations, and promotions, is the most direct type of control. In addition, I cannot overemphasize the fact that the activity of the many Federal employees for whom I speak is governed by their respective codes of professional conduct and their general professionalism and ethics, and if we ever tend to stray very far from that, we have the Office of Special Counsel, the various inspectors general, the Merit System Protection Board, the Office of Government Ethics, and so many new organizations within the last few years that it is phenomenal to cope with as we try to get our job done. We also, are of course, subject to congressional oversight.

It must also be remembered that although the proposed legislation would immunize the individual, a lawsuit against the United States based upon an employee's conduct would nevertheless directly bring into question the activity of that individual. Such a lawsuit would thus involve the reputation of the employee whose conduct was being questioned.

The necessity for this legislation cannot be played down by rhetoric. The proposal is not in any way an overreaction. As Deputy Attorney General Schmults noted in testimony before the House on H.R. 24, there are approximately 1,500 lawsuits pending, many with multiple, individual Federal employee defendants. The issue that should be addressed is whether thousands of Federal employees and their families should be put through the ordeal of suit, the accompanying worry and a possibility of financial ruin so that the rare Federal employee who in the minds of some may deserve to pay personally will not escape. I submit that this is far too high a price to pay. Mr. Chairman, I have a letter from a member of our association dated October 16 of this year, who is the director of an organization of the Environmental Protection Agency who relates his personal problems and what happened in the suit that he had filed against him by an employee who he had to fire for his irresponsible actions. I would like to submit that for the record, if I might.

Senator **Grassley**. It will be accepted.

Mr. **Shaw**. Thank you.

Mr. **Shaw**. The Senior Executives Association totally supports the goals and major provisions of S. 1775 and we totally endorse the concept that suits challenging the acts of Federal employees should be decided based upon a standard of reasonableness and good faith. It is important to Federal employees that such a defense be retained to avoid the possibility that an employee's position, standing, and reputation are not prejudiced by an adverse verdict or settlement in a case where an employee did act reasonably and in good faith.

Not retaining that defense, just as allowing suit against Federal employees, fosters reluctance to take action where the law is uncertain, the activity is controversial, or where there are strong competing interests. We also favor the elimination of most of the section 2680 exceptions in constitutional tort cases.

The career Government senior executives of the U.S. Government have, in my estimation, provided the American people a caliber of administration that is and should be the envy of any government in the world. They take seriously the charge of administering the laws of this land as equitably and efficiently as possible. They bring to those jobs enormous training and experience and the reputations of a lifetime of public service. They enter the profession of senior executive in part in hope that at long last they would be accorded the visibility and respect that their performance merited.

But they live each day with the denegration of their worth, whether it be in limitations on pay or in exposure to possible lawsuits for actions performed within the scope of their jobs. One does not have to look far to find evidence that even the most dedicated public employees are finding such conditions intolerable.

This bill, for all its individual merit, is really one very essential piece of a larger set of legislation needed to restore the effectiveness and morale of the public employees on which you depend to implement the laws you and the rest of the Congressmen and Senators pass.

I'd like to comment, if I might, Senator, on a few things that were discussed by prior individuals who testified. One of them was a question concerning insurance. We have pursued quite vigorously the possibility of obtaining insurance and making it available to our Government executives. We have been decidedly unlucky in trying to find insurance which was reasonable and which would provide the kind of protection that was necessary.

The problem has been that insurance companies are very, very reluctant to insure Government employees against the kinds of suits like the constitutional suit we are talking about here because they have no history of loss and they have no history of having provided this kind of protection before.

Lawyer malpractice insurance, and that kind of thing are different. The only kind of insurance that I'm aware of is a plan that is provided to some members of the FBI by an insurance company which provides very, very small limits of liability for a relatively nominal fee. We have not been able to find any other company that would provide simliar insurance in reasonable amounts.

It kind of is a sad state that Government employees as a condition of their employment may have to buy their own insurance in order to work and to protect their families from being totally wiped out financially.

We do believe there's a balance to be struck between getting the job done and accountability. It's the same in any organization. But right now the balance is way out of whack and it's on the side of trying to crucify a Government employee who happens to make a mistake, even if it is in good faith.

The question came up about attorneys fees. We would oppose the inclusion of a provision granting attorneys fees in this legislation. I am an attorney myself. I do some work in the private sector part-time in addition to my job as president of the Senior Executives Association, and, from my own personal knowledge, while I love attorneys fees cases when I represent clients, it often becomes the individual factor which will tip the balance of a plaintiff wanting to bring a case that may not have much merit. The attorneys can use that to sell the case to them and say, "Well, gee, if you win, after all, it's not going to cost you anything. You'll even get all your attorneys fees back." And it also provides an incentive to a lawyer to consider a contingency fee arrangement where the suit may not have much merit but if he brings enough of them he's liable to hit on a few and that will keep him going. It just is not a good policy to encourage this kind of litigation by plaintiffs by providing for attorneys fees.

Mr. Morrison in his testimony pointed out that, and I believe I—I'll paraphrase but it's close, that all cases now brought will continue to be brought even after S. 1775 is passed. That's just flat not true. The cases that were brought against the IRS executives that the attorneys I supervised represented, most of those cases were merely for harassment. They were brought for the purpose of trying to stop a tax investigation, whether it be a criminal or civil tax investigation. They were brought by tax protest groups in order to try to stop the individual revenue agent or revenue officer or particularly the criminal investigation agent from performing his duties and continuing an investigation. Often the tactic was successful because you would have to go through all this litigation and have to file all these papers. It was used as a discovery tool by many, many attorneys to try to find out what the agent had in his files and he had to come in and defend himself in the midst of a civil or criminal tax investigation, It was just a horrendous harassment tool and remains a tool to prevent effective implementation of the tax laws. In these days when we need effective implementation of the tax laws, what with the underground economy and the tax cuts, I think it is something that definitely should be looked at.

As far as the lawyer time spent handling cases such as these, fully 20 percent, and I'm trying to stay conservative, of the time that was spent handling these cases, most of which would never have been brought if there was legislation like 1775, was spent reassuring the individual, and in many cases his wife and his family that, "The case looks good," or dealing with the Department of Justice who are trying to reassure the individual that, "You don't have to worry about it too much. Even if you do lose, the likelihood that you will be reimbursed by the Government is high."

Even though the odds of losing one of these cases was very, very small, the mental trauma and the concern that was put upon the individual who was subject to this suit was just phenomenal to behold. It was debilitating, and it slowed down the ability of the Government to do its job substantially. One of the ways it slowed it down was because public officials became less and less willing to do anything without having a lawyer in writing tell them that it was an appropriate course of action to take. The belief was that if you had a legal opinion from the Chief Counsel's Office, the General Counsel's Office, that if you were to be sued, you could say, "Well, I got legal advice and therefore, I am not responsible. Or even if the action was wrong, I was operating in good faith with reasonable belief that what I was doing was right."

It definitely impacted and continues to impact on Government officials' ability to do their job without having a legal opinion. And I speak from personal experience. We issued many, many legal opinions in writing that, one, we never would have had to put out before, this kind of suit came into effect after Bivens, and two, we never would have had to put them in writing, even if we did, because it would have been all advice over the telephone and would have been much more expeditious for the Government and for the taxpayer.

It costs a lot of money for the public. While there should be accountability of employees, there are a lot of administrative procedures which can hold employees accountable, and the taxpayers should not have to pay for the conduct of these hundreds and hundreds and hundreds of harrassing suits that serve no public good whatsoever.

Thank you. I will be happy to answer any questions, Senator.

Senator **Grassley**. Well, thank you very much. I think you spoke a little bit about the morale problem among Federal employees, but I want to ask you if you think these suits are, in general, contributing to a general morale problem, or is it one of those cases of where, unless you are affected by it, you don't know about it?

Mr. **Shaw**. No; it is a case of wherever I go, individuals come up to me and talk about the suits that are taking place in their agency where they are personally defendants or people that they know are personally defendants and it is something that they're concerned about.

Since employees now bring these actions against their supervisors on any number of theories having to do with promotions, evaluations, discharge cases, discipline, equal employment opportunity, affirmative action programs, supervisors, and managers are very, very reluctant to face up to the employee who is less than great in his job performance. It rapidly reaches the point where, before the employee will give anyone a bad evaluation, he goes to the lawyer in the Chief Counsel's Office, General Counsel's Office, and says, "What happens to me if I do this?"

I have literally reviewed dozens and dozens in my prior position of just evaluations which pointed out problem areas to an employee and tried to help them develop and improve their performance because the supervisor was afraid to give the evaluation to the employee for fear that he would be sued.

Senator GRASSLEY. So then you have many examples like this?

Mr. SHAW. Absolutely. Many, many personal examples where I was personally involved.

Senator GRASSLEY. Again, I refer to a statement, the next statement that will be given by the General Government Acountability Project. It is stated that, "Without the threat of damages, an unscrupulous Federal official has nothing to lose by wholesale assault on constitutional rights."

Is it true, Mr. Shaw, that the Government employee has nothing to lose, absent a lawsuit brought against him or her?

Mr. SHAW. The Government employee has much to lose. The first thing he is going to lose is his job, if he or she has, in fact, has violated someone's constitutional rights. The Office of Special Counsel and the Inspector Generals in the various agencies are creatures of the Civil Service Reform Act and the Office of Government Ethics, also that act and the Ethics in Government Act. They are very, very scrupulous and "meaner than junkyard dogs" in their attempt to find people responsible for any actions which could be construed as being violative of people's individual rights. And in fact, the Office of Special Counsel conducts investigations without even the knowledge of the agency, often times, when these kinds of things are alleged.

Besides losing his job, he's going to lose his reputation, given the popular view of working for the Government as less than great. If he has any kind of stains on his or her record at any point in time, he certainly does not become employable in the private sector.

There are many, many things which would impede an employee from, either by accident or by design, violating anyone's constitutional rights. It certainly does not mean that they have to be paupered by a lawsuit in order to prohibit them from doing what's right.

Senator GRASSLEY. I assume that we could document that Government employees have lost their job as a result of allegations brought against specific employees.

Mr. SHAW. I would assume that is true. I know that to be true in situations where—I can't speak of specific cases. I would have to check with the Merit System Protection Board and the Civil Service Commission's Appeals Review Board for specific cases, but I know they exist.

Senator **Grassley**. So, would you provide us some of these?

Mr. **Shaw**. I will check with those two Government agencies to see what they have on that; yes.

Senator **Grassley**. Thank you very much for your testimony.

Mr. **Shaw**. Thank you.

[The prepared statement and letter submitted by Mr. Shaw follows:]

PREPARED STATEMENT OF G. JERRY SHAW

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE.

Good morning. My name is Jerry Shaw. I am President of the Senior Executives Association, the voluntary, professional organization that speaks on behalf of career members of the Senior Executive Service and supergrade executives.

I appreciate the opportunity to appear before this Subcommittee to support S. 1775. The Federal executive today is beset by numerous obstacles in performing effectively the work of the public service. While this is my first time to testify before this subcommittee, I have appeared before several other Committees of both Houses on a host of issues that impinge on the daily management of the Government's programs. While many other issues such as the restrictions on Federal pay and on Senior Service bonuses are receiving widespread attention in the press, I know of no issue which strikes more viciously at the morale of Federal managers and executives than the knowledge that they may be personally sued for actions performed within the scope of their jobs. Those suits may be as serious as violations alledged in areas where the law is unclear or they may be as trivial as allegations solely for the purpose of embarrassing a public manager. The fact that only 9 of some 1500 cases brought against Federal managers have resulted in judgements against the defendent suggests that most cases are marked by such trivial qualities. The knowledge that your employer may choose to disassociate itself from your defense considerably alters the enthusiasm one has for management. There are those who argue that such threats are necessary to produce a chilling effect on the arbitrariness of otherwise unchecked Government administrators. We suggest that the evidence of such arbitrariness is rare, that other administrative procedures exist to correct and punish such caprice and that the present laws result not in prudent management but in supine Federal administration whenever the limits of the law are fuzzy. As you are aware, the Congress expects that agencies be ruled by its intent as well as by its laws. Such opportunity for interpretation produces areas of uncertainty that still require executives to act.

Although I speak on behalf of the 7,500 career executives and by extension the 125,000 senior managers who have been charged with the efficiency of operations in the Government, I truly believe that legislation such as that before this Committee is in the interest of all parties--not just the group for which I speak. A deserving plaintiff would have a liberalized basis for recovery from the United States. Federal employees acting within the scope of their employment would no longer be subjected to the intimidation or harassment by lawsuits which could ruin them financially. The Federal Government would benefit financially by no longer having to spend money to retain private counsel to represent Federal employees in certain suits.

Passage of this type of legislation would lend certainty to a confused area of law. As a result of prior legislation, some Federal employees in certain situations now are immunized from suits against them personally, while other Federal employees are not. In 1961 Federal employees who were operating motor vehicles within the scope of their employment were immunized from suit. [28 U.S.C. § 2679] In 1965, Veterans Administration medical personnel were provided a similar type of statutory immunity. [38 U.S.C. § 4116] In 1970, Public Health Service medical personnel received similar immunity. [42 U.S.C. § 233] In 1976, immunity was extended to medical personnel employed by the Department of Defense, the Central Intelligence Agency and NASA. [10 U.S.C. § 1089, 42 U.S.C. § 2458a]

The type of legislation now under consideration would take the logical step of extending the immunity from personal suit uniformly to cover all Federal employees acting within the scope of their employment, and would also make clear that the immunity is applicable in suits which have come to be known as being based upon "constitutional torts". By so doing, the legislation would end the uncertainty and unfairness which prevails when different Federal employees are subject to different laws regarding their personal liability. By placing this statutory immunity within the provisions of the Federal Tort Claims Act, Federal employees, litigants and the courts will have the benefit of guidance in the form of case law resulting from the prior statutes which would be applicable as legal precedent.

Providing Federal employees with immunity from a lawsuit against them personally based upon the performance of their duties is consistent with the concept of obtaining the best performance possible from those Federal employees. Eliminating the specter of harassment and/or the possibility of personal liability allows Federal employees to focus totally upon their job performance without being intimidated by the possibility of a lawsuit. Thus, they can confidently take the course of action which is best for all affected thereby without considering the temptation of taking the safest action in terms of producing controversy, novel action, or lawsuits.

I attack head-on any suggestion that the possibility of suit against individual Federal employees personally is necessary or desirable as a guard against improper action by Federal employees. I know, for example, of no evidence that drivers of Federal vehicles have become more accident-prone since they received statutory immunity in 1961, or that various categories of Federally employed medical personnel became less dedicated or less able after various statutes provided immunity to them in 1965, 1970, and 1976.

There are adequate existing controls on the acts of Federal employees, without needing the threat of a personal lawsuit. I believe that to almost all Federal employees the accountability to supervisors which governs assignments, evaluation and promotion is the most direct type of control. In addition, I cannot over-emphasize the fact that the activity of the many Federal employees for whom I speak is governed by their respective codes of professional conduct and their general professionalism and ethics. It must also be remembered that although the proposed legislation would immunize the individual, a lawsuit against the United States based upon an employee's conduct would nevertheless directly bring into question the activity of that individual. Such a lawsuit would thus involve the reputation of the employee whose conduct was questioned.

But more directly, the proposed legislation expressly states that in cases of constitutional torts, if a suit results in a settlement or judgment paid by the United States, the Attorney General "shall" forward the matter to the head of the department which employed that individual for appropriate administrative investigation or disciplinary action. The laws available to the chief agency administrator or to the Inspectors General provide sufficient basis for disciplining employees for irresponsible acts. We believe that this provision which allows for appropriate administrative flexibility is far superior to any provision which would attempt to establish by legislation prospective specific disciplinary measures for every conceivable type of misconduct.

There is no question that Congress has the ability and authority to establish the Federal Tort Claims Act as an exclusive remedy. In Carlson v. Green, 446 U.S. 14, 18-19 (1980), the Supreme Court held that the availability of a remedy under the Federal Tort Claims Act did not preclude a Bivens suit because Congress had not explicitly declared the FTCA remedy to be a substitute for recovery directly under the Constitution and viewed as equally effective. Passage of this legislation would provide that explicit declaration that the Federal Tort Claims Act remedy is to constitute an equally effective substitute for recovery directly against a Federal employee acting within the scope of his employment based upon either the common law or an action under the Constitution.

Significantly, in the Carlson decision, at page 20, the Court noted that in the past Congress had explicitly stated its intention to make the Federal Tort Claims Act remedy exclusive, citing the statutory immunity statutes applying to Federal automobile drivers, medical personnel employed by various Government departments, and the manufacturers of swine flu vaccine. The proposed legislation is patterned upon those statutes and thus would receive a similar judicial interpretation. That is quite important because those statutes have repeatedly withstood any challenge to their constitutionality.

The necessity for this legislation cannot be played down by rhetoric. The proposal is not in any way an over-reaction. As Deputy Attorney General Schmults noted, there are approximately 1,500 lawsuits, many with multiple individual Federal employee defendants. The issue that should be addressed is whether thousands of Federal employees and their families should be put through the ordeal of suit, the accompanying worry and the possibility of financial ruin so that the rare Federal employee who in the minds of some may deserve to pay personally will not escape. I submit that this is far too high a price to pay. The thousands of innocent Federal employees should not be punished for occasional acts of a small number of individuals.

The optimism expressed in Butz v. Economou, 438 U.S. 478, 507 (1978) that insubstantial lawsuits against Federal employees could be quickly terminated upon motion has proved to be an illusion. Instead, the prediction expressed in the dissent in Butz, page 527, has proved accurate. It has proved to be easy to allege facts sufficient to survive a motion and require a full trial. A recent extreme example occurred in the Black Panther Party, et al. v. Smith (D.C. Cir., No. 80-1302, July 8, 1981). In that case a number of high ranking government officials who were sued filed affidavits stating that they were not in office at the times of the acts alleged and disclaiming any knowledge of or participation in a conspiracy against the appellants. The District Court granted their motions for summary judgment, but the Court of Appeals reversed that decision on the basis that the plaintiff was entitled to more discovery.

The SEA totally supports the goals and major provisions of S. 1775 and we totally endorse the concept that suits challenging the acts of Federal employees should be decided based upon a standard of reasonableness and good faith. It is important to Federal employees that such a defense be retained to avoid the possibility that an employee's position, standing and reputation are not prejudiced by an adverse verdict in a case where the employee did act reasonably and with good faith. Not retaining that defense, just as allowing suit against Federal employees, fosters reluctance to take action where the law is uncertain, the activity is controversial or where there are strong competing interests.

We also favor the elimination of most of the Section 2680 exceptions in constitutional tort cases. This would protect Federal employees from the possibility that a court would permit a suit against an individual employee if the suit against the United States were barred by one of those exceptions.

I believe the proposed legislation is advantageous to Federal employees and to plaintiffs. The applicable law would be clarified, eliminating confusion. Federal employees would be immunized from suit against them personally without making them unaccountable. Plaintiffs would have liberalized rights of suit against the United States, and would be certain of receiving any amount awarded rather than having to take their chance that a Federal employee would be able to satisfy a judgment. We believe that the legislation deserves passage and we urge prompt action.

In closing, the career Senior Executives of the U.S. Government have in my estimation provided the American people a calibre of administration that is and should be the envy of any government in the world. They take seriously the charge of administering the laws of this land as equitably and efficiently as possible. They bring to those jobs enormous training and experience and the reputations of a lifetime of public service. They entered the profession of Senior Executive in part in hope that at long last they would be accorded the visibility and respect that their performance merited. But they live each day with the denigration of their worth — whether it be in limitations on pay, or in exposure to possible suits for actions performed within the scope of their jobs. One does not have to look far to find evidence that even the most dedicated public employees are finding such conditions intolerable. This bill, for all its individual merit, is really one very essential piece of a larger set of legislation needed to restore the effectiveness and morale of the public employees on which you depend to implement the laws you pass.

I shall be pleased to answer any questions the Subcommittee may have.

October 16, 1981

12971 West Florida Drive
Lakewood, Colorado 80228

Mr. G. Jerry Shaw
President
Senior Executives Association
P.O. Box 7610
Ben Franklin Station
Washington, D.C. 20044

Dear Mr. Shaw:

Recently, I was sued, in my personal capacity, for activities which I carried out in the performance of my official duties. I had discharged an employee for a pattern of conduct of making false, irresponsible statements of criminal conduct against her co-workers. The employee had made more than a dozen charges in this regard, causing severe disruption to our facility, whose function is to develop technical evidence for EPA's enforcement case preparations. The employee alleged that her removal was a violation of her constitutional right of free speech. A major trial of this suit ensued in Federal District Court during the week of October 15, 1981. The jury found for me and not the plaintiff.

Although I received extensive and outstanding support from the Department of Justice during this case, it was an extraordinarily traumatic personal experience for me. My personal and professional reputation, to say nothing of my financial accomplishments (modest as they are) for the past 20 years, were put at great peril by this lawsuit. I am absolutely incredulous that Federal executives can be subjected to this kind of personal liability, to say nothing of the stress of defending oneself when you know you have acted entirely properly.

We are continually being told that we should exercise strict management oversight in assuring the performance of our staffs and the efficient accomplishment of our functions. This sort of personal liability inevitably has a chilling and inhibitive effect toward the accomplishment of that oft-stated goal. It is my belief that the passage of H.R. 24 is an absolute necessity if we are not to be deterred from our supervisory responsibilities by such threats from disgruntled employees. I hope you will redouble the efforts of the Senior Executives Association in this regard. I hope we can depend upon the Administration's active support for the early passage of this legislation, as was indicated by Mr. Meese in your most recent newsletter.

Sincerely yours,

Th P. Gallagher

Thomas P. Gallagher
Director, NEIC

cc: Honorable Edmund Meese III

Senator **Grassley**. Our next witness is with the Government Accountability Project of the Institute for Policy Studies.

Mr. Clark will be accompanied by Mr. Thomas Devine and Mr. James Gaylord. We are pleased that you could be here today and are ready to hear your testimony. Please feel free to summarize your testimony, if you wish, and, obviously, as I stated before, the full text of your testimony will be printed in the record, if that's what you desire.

Mr. **Clark**. My name is Louis Clark and I am Director of the Government accountability project. With me on my extreme left is Mr. James Gaylord and to my immediate left is Mr. Thomas Devine.

Mr. Devine will present some comments. Our written statement is over here on the table and has been submitted to the Subcommittee.

STATEMENT OF THOMAS DEVINE, LEGAL DIRECTOR; JAMES GAYLORD, LEGAL INTERN; AND LOUIS CLARK, DIRECTOR, ON BEHALF OF THE GOVERNMENT ACCOUNTABILITY PROJECT, INSTITUTE FOR POLICY STUDIES

Mr. **Devine**. Mr. Chairman, thank you for the opportunity to testify on S. 1775. We commend you for taking the initiative to insure that there will be a full public debate of the bill.

A common thread of our organization's activities, the Government accountability project, has been vigilance against government abuses of power. We specialize in this area by trying to help those government employees whom we feel are legitimate whistleblowers. We try to expose corruption or illegality. We take very seriously the warning that power tends to corrupt and "absolute power tends to corrupt absolutely." We accepted your invitation to testify because we have serious concerns about the effect of this bill on the most basic official abuse of power—violations of a citizen's constitutional rights.

We applaud the bill for constructively permitting agency chiefs to settle constitutional torts. We would hope that they take advantage of this and that litigation could be minimized.

We have several overall criticisms of what we think might be the effects of the bill. First, we think that its goals are possibly unrealistic and internally contradictory. In our opinion, the only way to achieve all of the different objectives of this bill is through mirrors. Second, we think it is clear that all of those objectives will not be achieved. There will be lawsuits in terms of constitutional remedies. There will be increased flexibility for Federal employees to pursue any activity, and resulting losses for citizen rights.

As the Supreme Court stated in *Marbury* v. *Madison*, "The very essence of civil liberty consists in the right of every individual to claim the protection of the laws whenever he receives an injury," yet this bill removes the remedies of individuals whose constitutional rights are invalid.

The third overall criticism that we have is that the proponents of the legislation have failed to consider the value of constitutionally protected conduct. We don't think this is a choice just between individual damages and the effective functioning of government. We think the constitutional values serve a very effective role, in fact, a fundamental role for government to function well.

Our specific comments begin with the problem of intimidation of Government employees. We think of this issue as largely a red herring, although the testimony has focused on it quite intensively. We don't think that this perspective or this stereotype of the Federal employee who is too afraid to act really squares with the mandate claimed by the current administration to neutralize overregulation, or with the administrations's claim that government has somehow gone wild against individual citizens. Quite simply, those positions contradict each other.

A careful look at the facts explains why the Government has been able to work effectively despite the fact that constitutional suits have existed for the last 12 years.

Initially, the threat of a lawsuit is minimal. We have close to 3 million employees in the Federal Government, but there have been approximately, according to the Justice Department, 2,000 constitutional suits pending against current or former employees. Now even if that was all against current employees, that would be about 1,500-to-1 odds. That's rare. And using the Justice Department's own figures, there have only been nine successful examples of litigation. You get into the position where it's almost too small to calculate the odds of successfully being sued.

Now, certainly, this is going to have some impact on employees. There is the possibility of a suit, and we welcome that. We think that Federal employees should exercise restraint in wielding their power. Certainly they shouldn't shoot from the hip or make snap decisions when the Constitution is in the line of fire. We simply cannot accept, however, that for the last 12 years the Federal Government has been significantly functionally inhibited by the fact that officials are personally responsible when they violate the Constitution.

Certainly the courts have been sensitive to these concerns and the Supreme Court has been particularly sensitive. That's why they have developed a qualified and what is essentially a sliding scale immunity, depending on the nature of the individual's responsibilities and the need for decisive action. The more that you must exercise power without inhibition in order to serve the public interest, the more immunity that you have from liability.

On balance, though, on the bottom line, four times in the last 5 years the Supreme Court has told government officials, from Federal employees to State Governors, that they can do their jobs effectively without escaping personal liability under the Constitution. This has been a repeated theme of the Supreme Court. You don't have to go beyond the law in order to serve the public effectively.

A second general criticism concerns increasing the burden on the taxpayer without actually helping the victims in terms of their remedies. Now, it's been pointed out that there's been a significant amount of time spent by government attorneys in defending suits. Well, under S. 1775, there will still be government suits. And to the extent that government attorneys are comforting public employees who are concerned about the effects of these suits, well, they will still need to comfort those employees.

As you pointed out, employees are concerned about the reputation problems, when they are the ones responsible for the Government being sued. I doubt that they are going to not want to tell the Government their side of the story when they're helping to work with the Government attorney to defend against an FTCA suit rather than an individual suit.

We think that the time spent on these suits is basically a time to prepare a factual defense and that's going to be true in any event.

The significant difference that we see between the status quo and S. 1775 is at the conclusion of the litigation. At the conclusion of the process under S. 1775, it is going to be the taxpayer who has to foot the bill for the abuses that occurred to the Constitution, and we don't think that that saves the Federal Government money.

We are also concerned that the victim's remedy will be diluted under this bill. Particularly, we were alarmed to see section 5(b), which gives the Attorney General binding authority to screen out constitutional suits. The way he does this is by certifying that the employee was acting within the scope of his or her office.

The House bill has a provision for judicial oversight of this particular decision, but the Senate bill doesn't, unless the Attorney General fails to act at all.

Mr. Chairman, it has been a basic judicial decision, ever since *Barr* v. *Matteo,* to determine whether or not the individual employee was acting within the scope of his or her authority. It determines immunity under the constitutional system. We can see no excuse for carving a loophole in the constitutional separation of powers by substituting a political appointee for the courts when making this basic decision about the ultimate limits of a government employee's power.

We shudder at the potential scenarios that could have occurred. For example, what would the result have been if Mr. Mitchell, the Attorney General during the Watergate scandal, could have certified that the "plumbers" were acting within the scope of their authority. And the Attorney General's fate after Watergate raises even more basic questions: Who defines the scope of the Attorney General's authority under this legislation? And who describes the scope of the President's authority?

As you may know, there are a number of suits currently pending for abuse of Presidential power.

Perhaps the primary reason, though, why this bill would lower a victim's remedies, make them less significant, is because it collapses into the procedures of the Federal Tort Claims Act. That means that there is an automatic possibility for 6-month delays in processing their suits. But more significantly, the Federal Tort Claims Act is not a remedial statute; it's not designed to make up for the problems that an individual suffers through punitive damages or a jury trial. The Supreme Court considered this effect in the case of *Carlson* v. *Green* and they concluded quite decisively from the majority even to Justice Powell, that the Federal Tort Claims Act is not a sufficient protector of citizens' constitutional rights. That is not its function.

We think another significant distinction is the good faith defense. If the United States assumes liability, we feel that the good faith defense is no longer appropriate. It is appropriate when an individual employee faces responsibility for his or her actions.

Finally, in terms of the adequacy of remedies, you have pointed out that under this bill we would be able to go to the United States, which wouldn't be judgmentproof in the extent of a larger award. Actually, we think this is a very sensitive concern on the part of the committee, but that doesn't mean that we should substitute for individual remedies currently available. We would suggest that your bill supplement the remedies that people have available under the Constitution in case the defendant is not able to pay damages.

Perhaps our most significant concern about S. 1775 is the third area that we would like to discuss: It will be an ineffective deterrent against future violations. This has to be, in our opinion, the core of evaluating the legislation—whether or not the constitutional rights of Americans are going to be served or weakened under the results of this legislation.

And under this key test, the Federal Tort Claims Act simply is not as effective as an action for damages. The Supreme Court recognized this explicitly in *Carlson* v. *Green,* when it found that conclusion "almost axiomatic." It's almost beyond debate that deterrence is going to go down, according to the courts.

Section 5(c) of the bill does have a provision for administrative discipline and it's been discussed quite a bit this morning. The Government accountability project has worked very closely with the administrative sanctions of the Civil Service Reform Act and also with the Freedom of Information Act, and we would like to comment upon the adequacy of this disciplinary structure.

We have questioned how serious the structure is intended to be pursued, because there is no particular structure established; it is simply a referral system. There's no obligation for the Government to act at all on the referral. And quite significantly, the victim, the person who has been hurt, doesn't have any role in the process. The victim is reduced to a helpless, passive bystander.

But regardless of the intentions of this particular legislation and even if it were bolstered in order to be a more detailed structure, we still doubt that it could work effectively. Our concern is based on the experience of previous administrative disciplinary structures.

The Freedom of Information Act has had such a structure for arbitrary and capricious denial of documents under the FOIA. In 7 years there hasn't been a single disciplinary proceeding under that act.

The Civil Service Reform Act of 1978 had such a structure under 5 U.S.C., 1206(g). In 3 years, however, much to the frustration of Government whistleblowers, there has yet to be a single case where a Government employee was disciplined for taking a prohibitive personnel practice, such as any illegal reprisal against whistleblowers.

We don't see any value in establishing another administrative exercise that doesn't accomplish anything. We feel that American citizens can best deter constitutional violations by defending their own rights, rather than having Government agencies do it for them.

The fourth area of concern that we have about the bill is particularly significant: It's that the analysis in this debate has been ignoring the hardship of the victims. We've heard problems from employees who have had to defend themselves from suits. But what about the people who are bringing the suits? Why do they bring those suits? Surely, it wasn't out of just some vacuous, malicious desire to sue Federal officials. Something happened to those individuals. And I think we have to consider what you are weighing against the hardship of the public employee when you surrender constitutional rights.

For instance, the 1974 Collinsville no-knock searches which preceded Federal Tort Claims Act amendments this bill would abolish, were no mere nuisance. With neither warrants nor warnings, Government agents kicked open the doors of two families' homes, shouted obscenities and threatened the helpless inhabitants with drawn guns. Well, certainly a lawsuit may keep you awake at night, but having Government agents break open your door and put a pistol at your head may also keep you awake at night. It may be something that you never forget for the rest of your life.

GAP has had a unique opportunity to observe the hardships involved in first amendment violations, because we counsel, and almost literally hold the hands of government employees who are whistleblowers and have been through the mill.

We have looked at the experiences of these individuals and I would like to summarize some of them with this particular constitutional depravation first amendment violations.

The retaliation has included personal nightmares such as loss of all professional responsibilities, dismissal, transfers to bureaucratic "Siberia" such as being sent to the Rio Grande border when you're used to working in Washington, D.C., continuous investigations repeatedly over the years to find evidence for prosecution and/or smear campaigns against the individuals, debilitating expenses even for the winners, family breakups, financial ruin and often times, long-term blacklisting from Government services.

These consequences, even from a first amendment violation, in our opinion, cannot be compared to those from a frivolous lawsuit that a government employee may face.

If anything, S. 1775 is going to eliminate liability for some of the worst forms of personal hardship, such as assault, battery, false imprisonment, malicious prosecution, and illegal wiretapping or surveillance.

This last provision, section 9 of S. 1775, which takes away the ability to sue for punitive damages against illegal government wiretapping, is particularly unnerving to us. The revision would repeal a basic commitment that an individual can defend themselves and fight back when their personal liberties have been invaded by illegal surveillance.

Let me turn to the premises of this bill which S. 1775 also would repeal when it was passed in 1967. "It is no wonder," according to the legislation's sponsor, "that in his famous dissent in the landmark *Olmstead* case in 1928 Justice Brandeis prophesied that the failure to understand the intrusions on personal liberty permitted by advancing technology represented 'the greatest danger to liberty.' "

There have been new technologies since 1967 and we don't understand why this bill would surrender individual accountability for those who stoop to "Big Brother" tactics. In our opinion, those type of government employees have no role in a free society.

Finally, we would like to consider another area that hasn't been included in the debate thus far on S. 1775, and that is the value of first amendment rights, in particular, as an illustration of how the exercise of constitutional rights enhances effective government. We think that they are an essential foundation of effective government, and we would like to briefly discuss the contributions of government whistleblowers who have acted under the first amendment.

As Professor Emerson pointed out, "Government employees make important contributions to the discussion of public issues, and those contributions become the more vital as the viewpoint of the speaker diverges from official policy." And that is particularly true in the case of congressional hearings, which, as Professor Emerson explained, involve "an effort to alert the public to problems buried in the depths of the bureaucracy. It thus serves one of the most basic purposes of the first amendment in aiding the citizenry to check upon the operations of government."

The Civil Service Reform Act recognized that and few cases illustrate the public interest value of whistleblowing under the first amendment more than that of Ernest Fitzgerald, who inadvertently became a whistleblower when he honestly answered at congressional hearings that the C-5A military aircraft was $2 billion over budget. He disclosed gross waste that the public was paying for. He also disclosed a "lemon" that could affect the national security.

Even President Nixon, who later engaged in retaliation against Mr. Fitzgerald for breaking the team spirit, declared in 1951, "It is essential to the security of the nation that every witness have complete freedom from reprisal when he is given an opportunity to tell what he knows. There is too much at stake to permit foreign policy and military strategy to be established on the basis of half-truths and the suppression of testimony—to let scheduled hearings amount to no more than a parade of yes men for administration policies as they exist."

That raises another very significant first amendment value to effective government—safeguarding the structural necessity of a free flow of information to Congress in order to maintain effective congressional oversight and also to uphold the separation of powers.

Last week seven Congressmen who span the ideological spectrum—seven members of Congress, excuse me—ranging from Senator Hatch to Congressman Moffett, supported Mr. Fitzgerald's lawsuit against President Nixon. Their reasons were fundamental to the separation of powers. They declared that removing liability "would enable the executive branch to control and distort the facts available to Congress, thus creating both an intrusion and an impediment to the legislative function of Congress."

Without liability, certainly testimony is going to dry up. As the congressional brief recognized, "The mere threat that civil servants could lose their jobs for providing factual information to Congress would inhibit any but the most courageous individuals."

A recent survey by the Merit System Protection Board confirmed the need to eliminate retaliation under the first amendment. Ninety-six percent of Federal employees surveyed definitely or probably approved of whistleblowing. A large percentage of them had experienced or personally observed fraud and waste, and 9 percent, which we extrapolate amounts to over a quarter million Federal employees, had personally witnessed fraud or waste in excess of $100,000. Yet less than 20 percent of these employees said anything about it. And one of the major reasons for their silence was fear of retaliation.

The legislative history of the Civil Service Reform Act explains that legitimate whistleblowing is essential for the public interest. We agree and believe that the exercise of first amendment rights can be essential for a Federal employee to fulfill his or her legal duty to uphold the code of ethics for Government Service;

We note in caution that the one area where the courts have extended this type of immunity, from personal liability for constitutional violations is in the military. And they did that for a very particular, specific reason: As the Supreme Court explained, "The peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline." Those are the reasons why military people are exempted from individual liability. There is a need for that type of conformity within a tight organization. But as the Supreme Court has pointed out, or as the courts have pointed out, once you get out of the military you would become a second-class citizen if you didn't have access to the courts to sue for your rights. And we are concerned that this bill would make all Americans second-class citizens in comparison with their current constitutional rights.

It would allow them to be hurt without access to the courts for crimes as those covered by military tort immunity and immunity from military constitutional liability. Let me consider some of the hardships that have been excused in those cases. Let us consider whether we want to extend the following examples to citizens at large.

In one case, military immunity was applied to dismiss officials who knowingly and intentionally compelled thousands of soldiers to march into a nuclear explosion during the 1953 atomic test in Nevada, resulting in massive radiation exposure and cancer.

In another example, the *Thornwell* case, it was used to remove liability from defendants who allegedly tortured a soldier, kept him in isolation for months, threatened him with death, then compelled the victim to take LSD before subjecting him to further physical and mental degradation.

There's a justifying reason to permit those outrages in the military, but not among the citizens at large. The cost is simply too great.

Certainly, we don't think that it would be desirable to set up a system where Federal officials were off the hook for crimes against the Constitution that State officials would not be affected by under this bill and would still be liable for. The Supreme Court has also commented on that: That to create that type of system would stand the constitutional design on its head.

In conclusion, we feel that the current administration was elected on a pledge to get the Government off the backs of Americans. We think that this bill, however—S. 1775—may do just the opposite. We urge the committee to carefully consider the warnings of the Supreme Court over 100 years ago that—

> No man in this country is so high that he is above the law. No officer of the law may set the law at defiance with impunity. All the officers of the government from the highest to the lowest, are creatures of the law and are bound to obey it.

Mr. Chairman, as with the other witnesses, we offer our testimony in a constructive spirit and we would be glad to work with your staff.

Senator **Grassley**. Are you sure you won't take a position in opposition to this legislation?

Mr. **Clark**. We're not fond of this particular piece of legislation, but we particularly want to comment on its impact.

Senator **Grassley**. Yes. Well, I appreciate that. I wanted to make that observation that that was the position of your organization, that you don't take positions on legislation. That's my understanding.

I wanted to mention since you did bring up the *Fitzgerald* case, that we are going to have Elliot Richardson testify at our next hearing, which hopefully will be soon after Thanksgiving, and it's our understanding that he will be testifying in support of that legislation.

Mr. **Devine**. Yes, sir. Mr. Richardson is the lawyer for Messrs. Harlow and Butterfield, who are also defendants in the suit. We suggest maybe you invite Mr. Fitzgerald to testify, and you can get both sides of the story.

Senator **Grassley**. I wanted to also raise the point with you that statistically—and I know that we shouldn't dwell too much just on statistics of this—but that 2,000 cases, those are cases that are pending now, they aren't cases that have been brought, because there are some that have been brought and dismissed and there are 2,000 still pending.

I guess the first thing I'd like to ask you to comment on, in the face of only nine judgments, and I know you don't dispute that, I'd ask you to seriously consider whether or not there's really any meaningful remedy that the citizens have that they would be losing and in fact then remember that this bill does give the citizens a remedy in the sense that if they do win their case they at least can get a judgment.

Mr. **Devine**. Well, we would have several comments on that. First of all, we appreciate that the bill does provide a remedy from the United States for citizens and we don't think any value would be served by removing that provision of the bill.

Second, however, we think that perhaps one of the real focuses of a constitutional suit almost goes beyond the idea that the individual is expecting to receive a lot of money. These are simply citizens who said that we've been abused of our freedoms and we want to fight back. We want a forum where we can defend our rights. And it's not just a case of, "Well, we expect to get rich off of the constitutional violations." That would be counterproductive because it hasn't happened. If the citizens want to be able to defend their individual liberties, we're concerned that going exclusively to the Federal Tort Claims Act will greatly deprive them of the opportunity. They'll be losing some of their legal weapons. They want to be able to have access to the courts like they do with any other rights.

Senator **Grassley**. I suppose at this point, then, I ought to remind you that employees themselves don't get off the hook because of the possibility of disciplinary referrals. The criminal laws are not being substituted in any way, and the fact that it can be found beyond scope as well, all of these are examples of ways in which the employees are going to, even though the Federal Government's being substituted for their own personal suits, to be disciplined or whatever else might be involved with seeing that they should not be encouraged to pursue things that are harmful to the individuals.

I guess I'd have to ask you that: Doesn't the fact that there are just nine judgments indicate that Federal employees and Federal officials do not go around violating peoples' rights?

Mr. **Devine**. We would certainly agree that the overwhelming majority of Federal employees are very conscientious and do not attempt to violate individual citizen's constitutional rights. But, of course, every effective Government structure has to be designed to be able to incorporate those who abuse it as well as those for whom there's no need for legal actions against.

Senator **Grassley**. Yes. Shouldn't the *Carlson* case be read as inviting Congress to act with remedial legislation?

Mr. **Devine**. We've studied that case very conscientiously and the Justices have said that if Congress wants to amend the Federal Tort Claims Act, that will present a different picture, but their analysis of the Federal Tort Claims Act as a deterrent to constitutional abuses was that the act was not effective, that it wasn't designed for that purpose.

The Court is, of course, quite hesitant to tell Congress what it should or should not be doing in its own policy. They looked at the effectiveness of FTCA as a deterrent and rejected it.

Senator **Grassley**. I guess I would tell you that I disagree with that interpretation of it and I would ask you to look at page 10 of the case as substantiating that point of view.

Mr. **Devine**. We certainly will, Senator, and we have quoted extensively from the *Carlson* v. *Green* decision in our testimony and you'll find references to the citation.

Senator **Grassley**. Thank you.

I am reminded of your comment about immunity involving military cases. The Price-Anderson Act on nuclear would be another example and also the swine flu vaccine legislation that was passed in early 1976 would be another example.

Even though I didn't specifically say this in regard to you, I would be happy to have you continue consultation with us as we have invited other groups to so do.

Mr. **Devine**. Thank you, Mr. Chairman.

Senator **Grassley**. Thank you very much for your testimony.

That's the end of my questions.

[The prepared statement of Messrs. Devine, Gaylord, and Clark follows:]

PREPARED STATEMENT OF THOMAS DEVINE, JAMES GAYLORD, AND LOUIS CLARK

CHAIRMAN GRASSLEY AND SUBCOMMITTEE MEMBERS:

Thank you for your October 28, 1981 invitation to testify on S. 1775. The bill would amend the Federal Torts Claims Act ("FTCA") (28 U.S.C. §§ 2671 *et seq.*) to substitute an exclusive remedy against the United States Government for constitutional torts committed by federal employees, instead of holding the responsible employees personally liable. We commend you for taking the initiative to insure a diverse public debate on this proposal to fundamentally change the nature of government accountability.

The Government Accountability Project ("GAP"), a project of the Institute for Policy Studies, is a non-profit public interest group formed in 1975 to help restore and maintain confidence in the federal system by making public officials accountable for their activities. In pursuit of these goals, GAP works to broaden public understanding of the role of the federal employee in preventing illegal government activities.

GAP has been especially concerned about civil servants whose careers are destroyed for having spoken out against governmental wrongdoing. Through public education, personal counseling and selective legal action, GAP works to protect the right of all federal employees to initiate criticism without fear of retaliation and to provide these men and women with vital support. See, *e.g.*, GAP's publication, *A Whistleblower's Guide to the Federal Bureaucracy* (1977). Last week the Supreme Court accepted GAP's *amicus curiae* brief in the lawsuit of Pentagon whistleblower Ernest Fitzgerald against former President Nixon and others for First Amendment violations.

The common thread of GAP's activities is vigilance against government abuses of power. We take seriously Lord Acton's warning: "Power tends to corrupt and absolute power corrupts absolutely." Our organization does not take positions in favor of or against passage of specific legislation. But we accepted your invitation to voice our concerns that S. 1775 could increase the most basic official abuse of power -- violating constitutional rights that are the core of our freedom.

S. 1775 constructively permits agency chiefs to settle constitutional torts for damages up to $25,000, or more with the approval of the Attorney General. Agency heads would be negotiating from a position of strength, to say the least. The bill permits the Attorney General to decide whether an alleged constitutional tort occurred within the scope of the responsible federal official's employment. Such a finding would let the employee off the hook. The victim's only recourse would be to sue the United States under the FTCA, with no possibility of punitive damages. And the United States could defeat the claim by arguing that the violation of constitutional rights was a "good faith" mistake. Government workers who engage in misconduct such as assault, battery, false imprisonment, false arrest, malicious prosecution, and abuse of process would also be sheltered from liability. Under S. 1775 the victim would not even have the chance to sue the perpertrator of illegal wiretapping or surveillance for punitive damages.

In overview, we offer several observations on S. 1775. Initially, the goals of the bill are unrealistic. The proponents simultaneously argue that constitutional lawsuits are a demanding drain on individual defendants; that switching remedies and having Uncle Sam pay the damages will cost less than having the employee pay the bill for his or her own misconduct; and that in spite of the purported cost savings, victims of constitutional violations will have a superior remedy than before. The only way to achieve all of these goals is with mirrors.

Quite clearly there are winners and losers in S. 1775. It places federal employees above personal responsibility in the courts for even the most determined assaults on the Constitution. The constitutional rights of citizens, on the other hand, are the big losers of S. 1775. In Marbury v. Madison,[1] the Supreme Court explained, "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." The bill shrinks the constitutional remedies of all Americans to a level like that currently available for soldiers. Similarly, an incarcerated federal prisoner today has more ability to recover damages for constitutional violations than any citizen under S. 1775.

In effect, this bill fails to recognize the "balances" in our system of checks and balances. While S. 1775 promotes the value of unrestrained freedom for the government, it only pays lip-service to the value of constitutional rights for citizenship in a free society. The proponents fail even to consider the value of constitutionally-protected conduct, such as blowing the whistle on corruption, other illegality, waste, or public health and safety threats. Similarly, proponents have ignored the significance of the First Amendment for a free flow of information to Congress, essential to maintain the separation of powers. Our specific concerns over the implications of S. 1775 are detailed below.

I. FALSE PREMISES FOR REMOVAL OF LIABILITY

Advocates of S. 1775 claim that personal liability depresses morale, leads to early retirement from government service and prevents officials from the vigorous, decisive pursuit of their duties. This picture of cowed bureaucrats hardly squares with the administration's perceived mandate to neutralize over-regulation by government agencies and employees. Throughout 1980 and 1981 we have heard pledges to get intrusive government employees off the backs of Americans. As a result, we are confused to learn that these meddlers have been timid and too afraid to act since 1971, when the Supreme Court first permitted constitutional suits in Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics.[2/]

Certainly the odds of a lawsuit are minimal. The Justice Department already has testified that there are some 2,000 constitutional suits pending against current or former federal employees. There is a federal workplace of close to three million civilian employees. Even assuming all the Bivens actions were against current employees, the odds against suit would be nearly 1,500 to 1. With only nine awards out of several thousand cases, the rate of suits dwarfs the rate of successful constitutional Bivens actions.[*] Undoubtedly the threat of suit persuaded many officials to exercise restraint in wielding power. The caution is welcome; federal employees should not shoot from the hip when the Constitution is in the line of fire. But it is hard for us to believe that this level of risk functionally paralyzes any conscientious federal official.

The moderate rate of suits and awards for constitutional torts should be no surprise. The Supreme Court doctrine of qualified immunity carefully considers the need for unrestricted government action on a case-by-case basis. As a result, there already is a "sliding scale" of immunity, which depends on an official's duties and the totality of the circumstances upon which the official must act.[3]

Four times in the last five years the Supreme Court has told government officials -- including a state governor and a congressman, as well as federal executive employees -- that they could do their jobs effectively without escaping any personal liability for constitutional violations.[4] As the Court explained, "Scheuer and other cases have recognized that...insisting on an awareness of clearly established constitutional limits will not unduly interfere with the exercise of official judgment."[5]

After analyzing the empirical results and the judicial restraints against unreasonable suits, it is rather obvious that the "timid bureaucrat" excuse to remove personal liability is a red herring.

II. INCREASING THE TAXPAYER'S BURDEN WHILE DILUTING THE VICTIM'S REMEDY

The bill purports both to save money for the government and to provide a superior remedy for victims of constitutional torts.

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[*] The low possibility of success for a Bivens suit should adequately deter plaintiffs from filing frivolous suits. There is no need for Congress to legislate a result that the legal "free market" can accomplish. Even if frivolous suits were a realistic problem, the proper response would be to assess court costs, attorney fees or some new penalty, not to wipe out the remedy entirely for meritorious as well as questionable claims.

Unfortunately, it will not achieve either goal and may be counterproductive for both.

Advocates state that S. 1775 would eliminate the need to hire private counsel and would save the expense of comforting government officials who are sued. We doubt that government attorneys expend much time or energy holding the hands of federal defendants in Bivens actions. And even under S. 1775 the government would have to pay for the defense. If anything, there will be more litigation and costly defenses if the bill weakens deterrence against constitutional abuses. (Infra, at 9-11.) The only significant difference between the status quo and S. 1775 is that under the latter the taxpayers will literally have to shoulder the financial consequences for misconduct by individual government employees. Quite simply, making the taxpayers foot the bill is not going to save them money.

It is difficult to seriously argue that S. 1775 enhances the rights of plaintiffs in constitutional tort actions. Initially, § 5(b) gives the Attorney General binding authority to screen out any constitutional suit by certifying that the defendant employee was acting within the scope of his or her office. Unlike H.R. 24, there is no provision for judicial oversight unless the Attorney General fails to act at all. In our opinion, there is no excuse for substituting a political appointee for the courts as the ultimate decisionmaker in determining whether an employee exceeded the legal limits of authority. This has been the central issue of challenges to government misconduct since Barr v. Matteo.[6] The Attorney General could simply define the job to fit the abuse.

We shudder at the potential for political abuse. For instance, under S. 1775 John Mitchell could have certified that the plumbers were acting within the scope of their authority when they engaged in their shenanigans, absolving them of personal liability. The fate of Mr. Mitchell raises an additional question. Under § 5(b) who defines the scope of the Attorney General's authority? Quite simply, it hardly serves the rights of citizens to give the executive the authority to define the limits of its power.

The most basic sacrifices for plaintiffs' constitutional rights, however, derive from the nature of FTCA. For instance, under § 4 of S. 1775, a plaintiff now will be governed by the procedural limitations of 18 U.S.C. § 2675(a). As a result, an agency may sit on a claim for six months before the plaintiff can deem the inaction a denial. In the interim, the victim is without discovery rights while memories fade, witnesses move and documents are destroyed.

The Supreme Court has explicitly considered the relative effectiveness of FTCA and constitutional causes of action from the victim's perspective. There was little contest. FTCA is not a remedial statute, structurally precludes either punitive damages or a jury trial, and is dependent upon the vagaries of state law. As the Court concluded decisively, "Plainly FTCA is not a sufficient protector of the citizens' constitutional rights...."[7/] Section 5(a) declares FTCA "an equally effective substitute" for Bivens suits. But while Congress may be able to fiat away legal causes of action, it cannot redefine reality through statutory language.

The bias of S. 1775 is evident in another distinction from H.R. 24. The latter denies the "good faith" defense to the United States for the constitutional abuses of its employees. S. 1775 passes the employee's good faith defense to the government. The good faith defense is appropriate to avoid unfairly punishing an individual who made an honest mistake. But substituting the United States as defendant removes that justification. The official is home free, and it does not matter to the victim why his or her rights were violated.

If anything, the United States defendant should be available to substitute for cases where plaintiffs currently can establish constitutional violations but not malice. This action would be consistent with the Justice Department's purported concern on a related issue -- that individual defendants may not be able to pay the damages, while the United States is solvent. The concern again is belied by the facts. Justice failed to provide any example where plaintiffs ultimately lost their judgment due to the government official's empty wallet. If the government truly wants to fill the potential loophole of a judgment-proof defendant, it should accept the previous custom of using FTCA as a complementary remedy. That was Congress' approach when it added FTCA as a complementary remedy for victims of illegal "no-knock" searches and other intentional torts of law enforcement officers.[8]

III. INEFFECTIVE DETERRENT AGAINST FUTURE VIOLATIONS

No responsible advocate of S. 1775 would support increased constitutional violations. In Butz v. Economou[9] the Supreme Court recognized deterrence as a significant factor when it rejected absolute immunity for federal officials. All perspectives on this bill should share the premise that the best policy system is the one that will most effectively deter future invasions of constitutional rights. By this key test, FTCA fails miserably in comparison with an action for damages. As the Supreme Court explained in Carlson v. Green,[10]

> Because the Bivens remedy is recoverable against individuals, it is a more effective deterrent than the FTCA remedy against the United States. It is almost axiomatic that the threat of damages has a deterrent effect, ...surely particularly so when the individual official faces personal financial liability.

The Court's reasoning is airtight. Without the threat of damages, an unscrupulous federal official has nothing to lose by wholesale assaults on constitutional rights.

In § 5(c) of the bill a procedure is offered for administrative discipline as a substitute for the deterrent value of liability. But the provision is little more than a token reference to referral for action "as may be appropriate." There is no structure established to seriously pursue the option and no obligation for the government to act at all on the referral. The plaintiff whose rights were abused is reduced to the role of a helpless, passive bystander. Unlike H.R. 24, S. 1775 does not mention discipline for constitutional torts among its stated purposes. The omission fairly represents the realistic effect of § 5(c) -- nonexistent.

Even if the administrative disciplinary referral were seriously offered as an equivalent to damages, it could not hope to succeed. The experience of previous administrative disciplinary structures is instructive on this point. The Freedom of Information Act calls for disciplinary action against arbitrary and capricious denials of information requested.[11] There has not been a single disciplinary proceeding since Congress passed the remedy seven years ago. The disciplinary provisions of the Civil Service Reform Act of 1978[12] have suffered a similar fate, with no successful litigation in close to three years. In our opinion, there is no value in establishing another meaningless administrative exercise in futility. It would only further increase the cynicism of those who suffer constitutional violations.

IV. IGNORING HARDSHIP OF THE VICTIMS

The most conspicuous omission in the proponent's analysis is the absence of any discussion of the personal consequences visited upon the victims of constitutional violations. Any consideration of the intimidating effect on a government employee who may lose a lawsuit[*] must be weighed against the suffering by those who find themselves stripped of the Bill of Rights. These violations can involve the most terrifying scenarios of a police state. For instance, the Collinsville warrantless searches that preceded 1974 FTCA amendments were no mere nuisance. With neither warrants nor warnings, government agents kicked open the doors of two houses, shouted obscenities and threatened the helpless inhabitants with drawn weapons.[13]

As an organization that counsels and represents whistleblowers, GAP has had a unique opportunity to observe the hardships involved in First Amendment violations. The First Amendment long has been recognized as a core personal freedom. As the Supreme Court declared in 1939,

> This court has characterized the freedom of speech and that of the press as fundamental personal rights and liberties. The phrase is not an empty one and was not lightly used. It reflects the belief of the framers of the Constitution that exercise of the rights lies at the foundation of free government by free men. It stresses, as do many opinions of this court, the importance of

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[*] For example, the frustration of an employee who may lose $1,000 in damages for destroying property has been cited repeatedly.

> preventing the restriction of enjoyment of these liberties. (Footnote omitted.)[14]

Unfortunately, government officials who will not tolerate dissent frequently attempt to ruin whistleblowers, as an example to others who might challenge the system. Whistleblowers face a personal nightmare that can include loss of all professional responsibilities, dismissal, transfer to a bureaucratic "Siberia," continuous investigations to find evidence for prosecution and/or smear campaigns; debilitating legal expenses, family breakups, financial ruin and even long-term blacklisting. The consequences of a First Amendment violation cannot be compared to those from a frivolous lawsuit, either in terms of the respective civil liberties at stake or the personal hardship that results.

If anything, S. 1775 eliminates liability for misconduct that produces the worst suffering, such as assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process (§ 6(a)), and illegal wiretapping or surveillance (§ 9). These provisions represent a significant retreat from enforceable constitutional rights. Agents once again could terrorize families as in the Collinsville no-knock raids, without fear of liability.

Section 9 of S. 1775 is particularly unnerving. It removes the remedy in 18 U.S.C. § 2520 to sue for punitive damages against illegal government wiretapping. Again, the Attorney General has the sole authority to decide if the surveillance was within the scope of the offender's employment. This revision would repeal a basic commitment to personal liability for illegal surveillance. As the legislative history explained:

> Virtually all concede that the use of wiretapping or electronic surveillance techniques by private unauthorized hands has little justification where communications are intercepted without the consent of one of the participants. No one quarrels with the proposition that the unauthorized use of these techniques by law enforcement agents should be prohibited. It is not enough, however, just to prohibit the unjustifiable interception, disclosure, or use of any wire or oral communications. ...The prohibition, too, must be enforced with all appropriate sanctions. Criminal penalties have their part to play. But other remedies must be afforded the victim of an unlawful invasion of privacy. Provision must be made for civil recourse for damages.[15]

The congressional commitment was grounded in the most basic concern for personal freedom. As the bill's sponsor declared in 1967,

> This safeguard is not new to a government based on checks and balances.
>
> ...It is no wonder that in his famous dissent in the landmark Olmstead case in 1928 [Justice Louis Brandeis] prophesied that the failure to understand the intrusions on personal liberty permitted by advancing technology presented "the greatest danger to liberty." The rapidly accelerating rate of technological achievement makes this statement frighteningly clear today. 16/

With new technologies the threat to personal privacy has increased greatly since 1967. Inexplicably, however, S. 1775 responds by surrendering individual accountability for those who engage in "Big Brother" tactics. Those individuals should have no role in a free society. In S. 1775 they have no role in the system of personal liability.

V. VALUE OF FIRST AMENDMENT RIGHTS FOR EFFECTIVE GOVERNMENT

Proponents of S. 1775 analyzed the bill as a choice between good government and individual remedies. That is hardly the whole picture. Beyond questions of personal freedom, constitutional rights provide an essential foundation for effective government. Perhaps nothing illustrates the public benefits that underlie constitutional rights more than the First Amendment in general; and the disclosures of federal whistleblowers to Congress in particular.

There is no question that speech protected by the First Amendment contributes heavily to healthy decisionmaking within government agencies.

> Government employees may thus make important contributions to the discussion of public issues, and those contributions may become the more vital as the viewpoint of the speaker diverges from official policy. Furthermore, freedom of expression on the part of government employees can play an important role in counteracting those stultifying forces which customarily pervade bureaucracy. Organizational pressures toward dullness and conformity in the public service can perhaps be partly overcome by establishing first principles that encourage, or at least protect, diversity in opinion and discussion. 17/

Equally significant, government experts who are free to testify truthfully at public hearings are essential tools of government accountability.

Expression of this sort, taking place in the

> public arena, falls more clearly within the main currents of the system of freedom of expression. It involves an effort to alert the public to problems buried in the depths of the bureaucracy, or at least to participate in open discussion of public affairs. It thus serves one of the basic purposes of the First Amendment in aiding the citizenry to check upon the operations of government. This function is enhanced when the particular employee has a special knowledge of the facts, a particularly relevant experience, or other forms of expertise.[18]

Congress includes 5 U.S.C. § 2302(b)(8) in the Civil Service Reform Act of 1978 in explicit recognition of the need "to protect whistleblowers from improper reprisals."[19] Indeed, protected dissent under the Reform Act inherently contributes to improved government functioning. To qualify as a whistleblower an employee must make a disclosure that he or she reasonably believes evidences illegality, mismanagement, abuse of authority, gross waste, or substantial and specific danger to public health or safety.[20]

Few cases illustrate the public interest value of whistleblowing as well as that of Ernest Fitzgerald, the Pentagon cost control expert who became a whistleblower by answering truthfully at Senate hearings that the C-5A military aircraft was $2 billion over budget. He not only disclosed gross waste but also a "lemon" that could affect the national security. Even Mr. Nixon, against whom Mr. Fitzgerald now alleges retaliation for the testimony, once recognized the importance of First Amendment speech to the national security. As then Senator Nixon declared in 1951,

> Mr. President, I have introduced in the Senate today a bill to make it a violation of law for any officer of the Federal Government to dismiss or otherwise discipline a Government employee for testifying before a committee of Congress.
>
> ...It is essential to the security of the Nation and the very lives of the people, as we look into these vitally important issues, that every witness have complete freedom from reprisal when he is given an opportunity to tell what he knows.
>
> There is too much at stake to permit foreign policy and military strategy to be established on the basis of half truths and the suppression of testimony.
>
> Unless protection is given to witnesses who are members of the armed services or employees of the Government, the scheduled hearings will amount to no more than a parade of yes men for administration policies as they exist.[21]

Mr. Nixon raised another equally significant public value of First Amendment speech -- the structural necessity of a free flow of information to Congress in order both to maintain effective oversight and to uphold the separation of powers.

In their amicus curiae brief supporting Mr. Fitzgerald's suit, seven congressmen spanning the ideological spectrum from Senator Hatch (R-Utah) to Congress Moffett (D-Conn.), declared that removing presidential liability

> ...would enable the executive branch to control and distort the facts available to Congress, thus creating both an intrusion and an impediment to the legislative function of Congress. Furthermore, whatever credence might otherwise be given to Petitioners' concerns about the Presidency, it is inconceivable that the proffered rationale for absolute immunity has any merit with respect to the exceedingly narrow and rare type of case...where the President is alleged to have deliberately sought to undermine the ability of another branch to perform its own Constitutional function.[22]

Essential or not, First Amendment violations in this context dry up the flow of information to Congress. As the congressional amicus brief recognized:

> The mere threat that civil servants could lose their jobs for providing factual information to Congress would inhibit any but the most courageous individuals. Although any employee might ultimately regain a lost job, the time and expense involved in doing so is substantial and involves a risk that few, if any, would take.[23]

Similarly, a recent survey of federal employees by the Merit Systems Protection Board confirmed the continuing need to eliminate retaliation. The survey found that 96% definitely or probably approved of whistleblowing and 45% had personally observed or obtained direct evidence of illegal or wasteful practices. Almost one-fourth (23%) claimed personal knowledge of fraud or waste involving more than $1,000 of government assets while 9% set the figure in excess of $100,000. Yet, less than 20% of employees took the initiative to make an official report of the misconduct. The most common reasons for their silence were doubts that disclosures would achieve results, and fear of retaliation.[24]

The legislative history of the Reform Act clearly established the public sacrifice inherent in continuing to deprive federal employees of their First Amendment right to blow the whistle. As the legislative history explains, eliminating retaliation would increase the exercise of this constitutional right:

> Protecting employees who disclose government illegality, waste, and corruption is a major step toward a more effective civil service. In the vast Federal bureaucracy it is not difficult to conceal wrongdoing provided that no one summons the courage to disclose the truth. Whenever misdeeds take place in a Federal agency, there are employees who know that it has occurred, and who are outraged by it. What is needed is a means to assure them that they will not suffer if they help uncover and correct administrative abuses. (Emphasis added.)[25]

In short, whistleblowing and the First Amendment are preconditions for effective government. The exercise of First Amendment rights may be essential for a federal employee to uphold his or her duties to the public as codified in the Code of Ethics for Government Service.[26] Quite frankly, the public interests served by S. 1775 cannot be seriously compared to those of the First Amendment, let alone the rest of the Constitution.

VI. EXTENDING MILITARY CONFORMITY AND HIERARCHIES TO THE POPULATION AT LARGE

The extremism of S. 1775 is illustrated by examining the rationale for an aspect of society where similar restrictions exist already -- the military. The Supreme Court introduced the doctrine of intra-military tort immunity in Feres v. United States.[27] It since has been extended to cover intentional constitutional torts committed by individual military personnel.[28]

There is no question that intra-military immunity exempts defense personnel from liability for even the most heinous constitutional offenses. In one instance it was applied to dismiss allegations that officials knowingly and intentionally compelled thousands of soldiers to march into a nuclear explosion during the 1953 atomic tests in Nevada, resulting in massive radiation exposure and cancer.[29] In another case the doctrine removed liability from defendants who allegedly tortured a soldier, kept him in isolation for months, threatened him with death, and then compelled the victim to take LSD before subjecting him to further physical and mental degradation.[30]

These outrages were tolerated reluctantly, and because of the structural necessities of military service. The Supreme Court looked to --

> [t]he peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme result that might obtain if suits...were allowed....[31]

It is essential to recognize the limited scope of the doctrine. For instance, the doctrine does not absolve defense personnel from misconduct against the general civilian population. And it ceases to absolve defense personnel from liability as soon as the soldier is discharged from the military service. The courts reason that anything less would brand veterans as second-class citizens.[32][*]

In effect, S. 1775 makes all Americans second-class citizens under the Constitution, just as it relegates government whistleblowers to that status. S. 1775 forces the citizenry to make the sacrifices of military conformity without the underlying justification. Indeed, in the case of whistleblowers' constitutionally protected dissent, the Supreme Court has deemed the value of the ensuing debate as "essential."[34] (Supra, at 13-17.)

Beyond reinforcing conformity to the society at large, S. 1775 implements a caste system that establishes a new class personally above the law -- federal employees.[**] But the members of the privileged class would only be safe as long as they refrained from pursuing their own constitutional rights. Once federal whistleblowers attempt to enforce their rights through constitutional suits, they would be as helpless as the citizenry at large.

This system of privileges is unprecedented for public servants outside of adjudicatory structures. Even a member of Congress is not immune for constitutional torts beyond the Speech and Debate Clause.[35] Similarly, S. 1775 exempts federal officials from liability for the same constitutional violations that would subject a state employee to suit. In short, the bill creates a topsy-turvey world of unequal liability that the Supreme Court already has firmly rejected.

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[*] Similarly, it is impermissible for administrative remedy to substitute for judicial access when federal prisoners allege constitutional violations.[33]

[**] § 9 of the bill also offers an ex post facto reprieve for defendants in pending suits, including President Nixon in the Fitzgerald case.

> To create a system in which the Bill of Rights monitors more closely the conduct of state officials than it does federal officials is to stand the constitutional design on its head.36/

SUGGESTIONS FOR MODIFICATIONS

In light of the concerns discussed above, we offer the following suggestions for modifications to S. 1775:

1) Constitutional and other intentional torts should only be added to the Federal Tort Claims Act as a complement to a Bivens remedy, not as a substitute.
2) There should be no provision for the United States to employ the "good faith" defense against a constitutional tort committed by its agent.
3) The courts, rather than the Attorney General, should continue to define the scope of an agent's employment in actions involving constitutional torts.
4) Disciplinary actions following judgments should be referred to the existing structure in 5 U.S.C. § 1206(g) involving the Office of the Special Counsel of the Merit Systems Protection Board. In addition, the victim of the alleged misconduct should have the right to judicial appeal of Special Counsel or Merit Systems Protection Board findings.

CONCLUSION

This administration was elected on a pledge to get the government off the backs of Americans. We are concerned that S. 1775 may do just the opposite by offering government officials a blank check to snuff out constitutional rights without fear of judicial liability. In evaluating S. 1775, we urge the Committee to carefully consider the warnings of the Supreme Court both 100 years ago and today. In 1978 the Butz Court quoted its 1882 counterpart in United States v. Lee:

> Our system of jurisprudence rests on the assumption that all individuals, whatever their position in

government, are subject to federal law:

> 'No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government from the highest to the lowest, are creatures of the law, and are bound to obey it.' *United States v. Lee*, 106 U.S., at 220, *1 S.Ct.*, at 261.

ENDNOTES

1. 1 Cranch 137, 163, 2 L.Ed. 60 (1803).

2. 403 U.S. 388 (1971).

3. *Scheuer v. Rhodes*, 416 U.S. 232, 247-49 (1974).

4. *Carlson v. Green*, 446 U.S. 14, 19 (1980); *Davis v. Passman*, 442 U.S. 228, 246 (1979); *Butz v. Economou*, 438 U.S. 478, 506-07 (1978); *Scheuer v. Rhodes*, *supra*, 416 U.S. at 239-40.

5. *Butz*, *supra*, 438 U.S., at 506-07.

6. 360 U.S. 564 (1959).

7. *Carlson v. Green*, *supra*, 446 U.S., at 22-23.

8. S.Rep. No. 93-558, 93rd Cong., 2d Sess. 2-3 (1974), U.S. Code Cong. and Admin. News 1974, pp. 2790-91.

9. 438 U.S., at 505.

10. 446 U.S., at 21.

11. 5 U.S.C. §§ 552(a)(4)(F) and 1206 (e)(1)(C).

12. 5 U.S.C. § 1206(g).

13. S.Rep. No. 93-558, *supra*, at 2.

14. *Schneider v. State*, 308 U.S. 147, 161 (1939).

15. S.Rep. No. 90-1097, U.S. Code Cong. and Admin. News 1968, p. 2156.

16. 114 *Cong*. *Rec*. 19099 (remarks of Representative Gallagher).

17. T. Emerson, *The System of Freedom of Expression*, 563-64 (1970).

18. *Id*., at 574.

19. *Report of the Senate Committee on Government Affairs on S. 2640*, Rep. No. 95-969, 95th Cong., 2nd Sess. 8 (1978).

20. 5 U.S.C. § 2302(b)(8).

21. 97 *Cong*. *Rec*. 4393 (1951) (remarks of Senator Nixon).

22. Brief for *Amicus Curiae* Orrin G. Hatch, *et al*., *Nixon, et al. v. Fitzgerald* (S.Ct. Nos. 79-1738 and 80-945), at 25.

23. *Id*., at 7.

24. Merit Systems Protection Board Office of Merit Systems Review and Studies, *Do Federal Employees Face Reprisal for Reporting Fraud, Waste or Mismanagement?* (April, 1981).

25. S. Rep. No. 95-969, *supra*.

26. P.L. 96-303 (July 3, 1980).

27. 340 U.S. 135 (1950).

28. *Misko v. United States*, 453 F.Supp. 513, aff'd 593 F.2d 1371 (1979); *Schmid v. Rumsfeld*, 481 F.Supp. 19 (N.D.Cal. 1979).

29. *Jaffe v. United States*, 468 F.Supp. 632, 633-34 (D.N.J. 1979).

30. *Thornwell v. United States*, 471 F.Supp. 344, 346-48 (D.D.C. 1979).

31. *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666, 671 (1977) (citation omitted).

32. *Thornwell v. United States*, *supra*, 471 F.Supp. at 353. *Misko v. United States*, *supra*, 453 F. Supp., at 515.

33. *Brice v. Gowler*, 604 F.2d 664, 667 (10th Cir. 1979).

34. *Pickering v. Board of Education*, 391 U.S. 563, 572 (1968).

35. *Gravel v. United States*, 408 U.S. 606, 615 (1972).

36. *Butz v. Economou*, *supra*, 438 U.S., at 504.

37. *Butz*, *supra*, at 506, quoting *United States v. Lee*, 106 U.S. (16 Otto) 196), 220 (1882).

Our last witness is Mr. Rod Murray, president of the Federal Managers Association. From your statement, Mr. Murray, I see that your association is the largest management organization in the Federal Government, and would you like to come on up here?

You have Mr. Bray with you, the executive director?

Mr. MURRAY. Yes, I do.

Senator GRASSLEY. And Andreas Evans, assistant executive director, is that right?

Mr. MURRAY. Yes, Mr. Chairman.

Senator GRASSLEY. Fine.

STATEMENT OF ROD MURRAY, PRESIDENT, FEDERAL MANAGERS' ASSOCIATION, ACCOMPANIED BY BUN BRAY, EXECUTIVE DIRECTOR, AND ANDREAS EVANS, ASSISTANT EXECUTIVE DIRECTOR

Mr. MURRAY. Let me say, Mr. Chairman, we appreciate this opportunity to testify and also the work that you have done in introducing this bill. This has been a matter of concern for our association for quite some years.

Our association is the oldest management organization, having been founded in 1913. We are the largest management organization. We represent all of management, firstline supervisors through members of the Senior Executive Service. Our membership is located not only throughout the United States but some of our members, indeed, are in parts of Europe and Asia.

We will, of course, submit our statement in compliance with the Chair's wishes and I will make a few brief statements and at the end of that time if the Chair permits, Mr. Bray and Mr. Evans will also add to it.

Senator **Grassley**. Yes, we will include your statement in the record.

Mr. **Murray**. We are quite concerned with the direction of concern that many people are taking toward this bill, and that being FBI agents breaking down doors with illegal searches and actions having been taken by one of our former Presidents.

We are concerned more than that, Mr. Chairman, with the fact that out of these 1,500 to 2,000 cases that are pending, a majority of them are against middle level managers and are brought by their employees whom they have taken disciplinary action against. To say that this does not cause a problem is not looking at things realistically. We know all too often that the same people who tend to criticize the Federal Government, particularly Federal management with inefficiency and incompetence then are the ones who turn around when we address a deterrent to effective Federal management, turn around and say, "Over the past 10 years or so we have noticed no effect on the efficiency of that management." There seems to be a contradiction somewhere there.

We would quote from the General Counsel of the Office of Personnel Administration during the Carter administration that said, "The fear of personal liability sometimes makes them (managers) not take action against an employee. Instead, they put him in another room and try to forget about him."

We have had a tremendous concern, not just from the relatively few people who have had court cases filed against them. We've had a great concern throughout our entire membership. Many of our chapters have engaged lawyers, and paid retainers to address just these very subjects.

I know of no thing that is more damaging to efficient Federal management than the particular things we're talking about. We have heard a previous witness here today talk about the impact that such a case can have on an individual. I would say, Mr. Chairman, that that impact is shared by all of the Federal employees, and Federal managers, who work with or around that individual. The word spreads rapidly and just the fact that Federal managers in particular are subject to this type of action, they can indeed take the chance of losing their property and although we have had it pointed out that the Justice Department and other agencies do at many times provide legal services in these cases, we find that all too often our members, just like they prefer to choose their own doctors, they have greater trust in their own lawyers, so they go to great legal expense, hiring their own lawyers in addition to those that are provided to try to defend against this.

Mr. Chairman, this has been a major issue. We strongly support this legislation. We strongly urge that this committee accept it. And for some of the misconceptions that have been expressed by Members of the news media as well as many members of Congress who still look at this bill with somewhat limited vision, as being addressed toward FBI agents, may we say that we feel we haven't done our job in properly presenting and educating people to the dangers that are now faced by all Federal managers and, in the future, we intend to do a much better job.

Now, Mr. Bray?

Mr. **Bray**. Thank you, Mr. Murray..

It's very interesting to note that Dr. Don Devine, when he became Director of the Office of Personnel Management at the beginning this year, in this administration, sent a letter to FMA along with other groups and he had six objectives, and one of them was to ask the Congress to reform the Federal Tort Claims Act to eliminate personal liability for Federal officials. These officials should be protected from paying personal damages resulting from actions taken within the regular performance and legal scope of their Federal duties. We certainly feel that that is a very strong and important point and one that we must remember at all times.

All this came to my personal attention many years ago as staff director of the House Manpower Subcommittee, in doing a congressional overview at the Army Arsenal at Watervliet, Albany, N.Y., when the top director there said to me, "Mr. Bray, I must, too, certify to each gun barrel that goes out of here, and if one gun barrel were to explode or some problem arose at any place in the world, I can be liable personally and my family," and that struck me. This was many years ago and we brought that back and told that story to many people in town, to the interest and surprise of many.

Thank you, Mr. Chairman.

Mr. **Evans**. Mr. Chairman, I appreciate, along with Mr. Murray and, of course, Mr. Bray, an opportunity to talk about this. I think it clearly indicates a weakness in our system, and that is that a Federal employee operating in what he believes to be his best judgment, working toward resolving some problem that is a function of his job, would find himself in the middle of a suit with her personal home at stake, his family under enormous pressure, pressure that is unduly brought to bear on them. It's clearly an improper way to operate and it's very serious and it's growing.

We've talked about 1,500 cases. As the Justice Department has already pointed out, those cases may range from one individual to as many as 30 or 45. So we're not talking about 1,500 cases, Mr. Chairman. We're probably talking in the neighborhood of maybe 30,000 people who are facing these suits in one way or another. They may be named and will be named for some good long while.

Ultimately, perhaps, their names will be dropped. But in the meantime they will have been, as someone used the phrase, "chilled" in the process of doing their duty in the long run.

I think it's terribly serious and I think it's time we dealt with it and we appreciate so very much this committee, your chairmanship, proceeding along these lines. We support this legislation wholeheartedly.

Senator **Grassley**. For my own information, how many members do you have in your organization?

Mr. **Murray**. Roughly 15,000, Mr. Chairman.

Senator **Grassley**. 15,000?

Mr. **Murray**. Yes, sir.

Senator **Grassley**. Thank you.

You cited in your written testimony instances where IRS agents had liens placed against their property. Could you give us any further detail?

Mr. **Murray**. Mr. Chairman, we'll be happy to furnish you with that in greater detail later on. We don't have actual cases with us.

Senator **Grassley**. We look forward to receiving those cases.

Mr. **Murray**. We may call the Chair's attention to one article that appeared in U.S. News & World Report on September 8, 1980, entitled, "Why More Bureaucrats Are Being Sued." It is a fairly good article that speaks to the many issues, including IRS agents, air traffic controllers. Of course, we had air traffic controllers sued several years ago after the crash of Eastern Flight 412, I think it was, in Charlotte, N.C. Individual survivors leveled suits against I think four air traffic controllers at that time. So, we go not just to the management level but we go down to the employee level really. All Federal employees are basically subject to suit.

Senator **Grassley**. Do you have any breakdown on the percentage of cases dealing with personnel and regulatory as opposed to constitutional suits brought against the Federal employee?

Mr. **Murray**. Only that we know at the moment that a majority of the cases are indeed, as I mentioned earlier, the cases of employees whom disciplinary action has been taken against suing their supervisors for doing so. Now, it runs the whole gamut but to the best of our information from the Justice Department, that is the majority of the cases now pending, which do not even deal with the private sector.

Senator **Grassley**. Witnesses before you stated that characterizations of Federal employees as fearing reprisals in the forms of a lawsuit are greatly overstated. Can you cite any concrete examples of areas in which Federal employees are afraid to make decisions?

Mr. **Murray**. Well, I can repeat the fact that many of our chapters and a greater number every day are engaging lawyers under binders to protect them just from this one instance. It's one of these things that you can look at and there's no way to put somebody on a stand and prove whether or not they failed to take disciplinary action because they were afraid to or for some other reason. But, within our organization, manager-to-manager, and talking, we do know that this is a deterrent to effective management. There are many cases where managers are afraid to take action because they realize that they can subject not only themselves but their families to tremendous ordeals and the fact that there has only been nine cases that have been upheld does indeed point to the fact that most of them are without substance, but just the fact that there are nine cases, I hate to use the word "only," the fact that there are nine cases is enough to put a great deal of fear in the Federal managers. The fact that there is one case that had been upheld and that Federal managers no longer have an immunity, which the courts gave them for many years, is enough to cause great concern and great fear.

Senator **Grassley**. That's the end of my questions. I want to thank you and your association for appearing and giving testimony, for your basic support of this legislation, and look forward to any future comments you have on it as you help this evolve through the legislative process.

Mr. **Murray**. Thank you very much, Mr. Chairman.

[The prepared statement of Mr. Murray follows:]

PREPARED STATEMENT OF ROD MURRAY

Mr. Chairman, I am Rod Murray, President of the Federal Managers' Association, the oldest and largest management organization in the Federal government. Our Association has chapters in most departments and agencies of the government, both civilian and defense.

I am most pleased to testify today in support of S-1775 which proposes to make the U.S. Government liable for constitutional torts and the exclusive defendant in all tort suits involving Federal employees acting within the scope of their employment. It is my considered judgement that this legislation is sorely needed to free managers from the undue threat of great economic loss as a result of personal liability for "line-of-duty" actions.

The problem has been growing because of two significant developments. The first was the Supreme Court decision in "Bivens vs. Six Unknown Named Agents" which came in 1971. The court held that Congressional authorization was not required to expose individual Federal officials to personal liability for violation of Fourth Amendment rights. The courts have continued to widen the exposure of Federal officials since then to claims on almost any constitutional infraction. The second development is the proliferation of litigatory actions on all fronts. Indeed, today everybody wants to "call my lawyer" about almost anything.

Mr. Chairman, there is in excess of 1500 cases pending against Federal employees at all levels. For example:

- A Customs service agent was successfully sued for $7500 for impoundment of a man's car for several months during an investigation.

- A miner was awarded $1000 by the court in a suit against a forest ranger for destroying the man's property.

- Four IRS employees have liens placed against their property because a citizen claimed they owed him money.

- Four air traffic controllers stood trial for 3 weeks before being cleared of civil charges of negligence in the Charlotte plane crash of an Eastern Airlines jet.

A great majority of the cases, however, are against middle managers. Many of these cases result from personnel actions. A classic example is the case of a GS-14 manager and a Navy captain who were for more than two years involved in litigation brought by an employee who claimed first and fifth amendment violations when disciplined by them.

Although much publicity is accorded suits filed against high level political appointees and elected officials including the President, the problem is greater on the opposite end of the management spectrum. Moreover, the suits range from serious to almost frivolous.

Tort suits against Federal managers are not serving the best interest of the American taxpayer. From the government's perspective, they are tremendously expensive administratively, impede productive work, and cause needless anxiety for the Federal managers named in such suits. From the standpoint of the aggrieved party, these suits provide little or no relief because they seldom result in a collectible judgement. Additionally, they are expensive and time consuming while for the most part are a harassment to the Federal manager.

There is a growing tendency to sue managers over personnel actions. So much so that it has an impact on personnel management decisions. The General Counsel of the Office of Personnel Management during the last Administration, Marjory Waxman said, "The fear of personal liability sometimes makes them (managers) not take action against an employee. Instead, they put him in another room and try to forget about him." Managers cannot faithfully discharge their duties knowing that at any given time, a good faith judgemental error could land them in court with their personal funds at stake.

Opponents of this legislation may argue that the present system makes managers act more responsibly because they are personally liable for their line-of-duty actions. Also, they may argue that an aggrieved party should have a means of redress for damages. S-1775 does not propose an elimination of responsibility and certainly would not propose preventing suit by a person who feels wronged.

The fact is that a manager's responsibility is increased because under the provisions of the bill, the suit would be brought against the U.S. Government. Thus a successfully sued agency may under the government's personnel program take appropriate action against an official ranging from simple reprimand to dismissal. In the present system, the suit is outside of the agency's direct concern and may not lead to any action, when in fact there should be some form of adverse personnel action.

All levels of management understand and gladly accept that their failure to perform in a responsible way can lead to dismissal. In my view, that is sufficient intimidation to insure responsibility; while at the same time does not unduly threaten managers. What they cannot accept is that their economic life should be jeopardized by their personal liability for judgements made within the scope of their employment.

Mr. Chairman, there is a more practical side to this issue. As I indicated earlier, constitutional tort suits have proliferated since the 1971 Bivens decision. Many of these cases are in reality nuisance cases and serve only to harrass managers. (Nine have ended in monetary judgements.) They nevertheless are time consuming for the manager, his counsel and others who may be involved in depositions, brief preparation and so forth. The defendant manager is taken away from pressing duties for long periods of time in working with his counsel. In addition, it is very difficult to function at peak efficiency with litigations against you which, if successful, could ruin you.

The idea of immunizing Federal employees from suits arising from constitutional torts is not at all new. We have laws now that on a piecemeal basis immunizes specific categories of Federal employees such as those who operate motor vehicles and some medical and paramedical employees. Clearly, however, suits against managers over such things as non-selection for promotion, performance ratings, disciplining actions of all kinds, simple instructions to subordinates and alledged EEO violations are impacting on managers' ability to function with authority. Although in many of these type cases, the manager is improperly named, he/she still goes through the anguish for sometimes long periods and will for reasons of personal protection hire their own counsel.

Finally, Mr. Chairman, this is not a bipartisan issue. I have already noted that the previous Administration supported this kind of legislation. Shortly after his confirmation, the present Director of the Office of Personnel Management listed it as one of his six priority goals. Dr. Donald J. Devine said: "These officials should be protected from paying personal damages resulting from actions taken within the regular performance and legal scope of their Federal duties".

Mr. Chairman, as a management organization dedicated to improving productivity and efficiency, the FMA sees the present system as impeding these two critical goals. We are not asking for absolute immunity for the government; indeed we would not support such legislation. I also would not support legislation that would interfere with prosecution for criminal violations. S-1775 does neither of these two things. Enactment of this bill will allow the citizen to obtain redress and the public manager to conscientiously perform his mission. The citizen, the government and the taxpayer will be the beneficiary of this legislation.

I'll be glad to answer any questions.

Senator **Grassley**. This panel concludes today's hearing on our legislation amending the Federal Tort Claims Act. I want to thank all of the fine witnesses for being with us today and contributing to what I believe will be a very valuable record. We have not yet scheduled a date for our third day of hearings. It will most likely be shortly after the Thanksgiving Day recess. Again, thank you all for being here today. This hearing is adjourned.

[Whereupon, at 11:51 a.m., November 16, 1981, the hearing was adjourned subject to the call of the Chair.]

APPENDIX

II

97TH CONGRESS
1ST SESSION

S. 1775

To amend title 28 of the United States Code to provide for an exclusive remedy against the United States in suits based upon acts or omissions of United States employees, to provide a remedy against the United States with respect to constitutional torts, and for other purposes.

IN THE SENATE OF THE UNITED STATES

OCTOBER 26 (legislative day, OCTOBER 14), 1981

Mr. GRASSLEY (for himself and Mr. DOLE) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To amend title 28 of the United States Code to provide for an exclusive remedy against the United States in suits based upon acts or omissions of United States employees, to provide a remedy against the United States with respect to constitutional torts, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That subsection (b) of section 1346 of title 28, United States Code, is amended—

(1) by inserting "(1)" after "jurisdiction of"; and

(2) by striking out the period at the end thereof and inserting in lieu thereof ", or (2) civil actions on claims against the United States, for money damages, sounding in tort arising under the Constitution of the United States for injury or loss of property, or personal injury or death, caused by an act or omission of any employee of the Government while acting within the scope of his office or employment, such liability to be determined in accordance with applicable Federal law.".

SEC. 2. Section 2672 of title 28, United States Code, is amended in the first paragraph—

(1) by inserting "(1)" after "United States" the first place it appears;

(2) by striking out the colon after "occurred" and inserting in lieu thereof ", or (2) for claims for money damages sounding in tort arising under the Constitution of the United States for injury or loss of property, or personal injury or death, caused by an act or omission of any employee of the Government while acting within the scope of his office or employment, such liability to be determined in accordance with applicable Federal law:"; and

(3) by inserting "or any award, compromise, or settlement based on a claim arising under the Constitution of the United States" after "25,000".

SEC. 3. Section 2674 of title 28, United States Code, is amended—

(1) by striking out the comma after "claims" in the first paragraph and inserting in lieu thereof "other than those arising under the Constitution of the United States,";

(2) by inserting "(a)(1)" at the beginning of the first paragraph;

(3) by inserting "(2)" at the beginning of the second paragraph; and

(4) by adding at the end thereof the following new subsection:

"(b)(1) The United States shall be liable, respecting the provisions of this title relating to tort claims arising under the Constitution of the United States, to the extent recognized or provided by applicable Federal law, and shall be entitled to all defenses heretofore available to an employee of the United States and to which the United States would otherwise be entitled. The United States shall not be liable for interest prior to judgment or for punitive damages.

"(2) Damages in any such case shall be the greater of (A) actual damages or (B) liquidated damages of $1,000 or, in the case of a continuing tort, $100 a day for each day of violation up to a maximum of $15,000.".

SEC. 4. Subsection (a) of section 2675 of title 28, United States Code, is amended by striking out the comma after "employment" and inserting in lieu thereof "or upon a claim against the United States for money damages for a tort arising under the Constitution of the United States caused by an act or omission of any employee of the Government while acting within the scope of his office or employment,".

SEC. 5. (a) Subsection (b) of section 2679 of title 28, United States Code, is amended to read as follows:

"(b) The remedy against the United States provided by sections 1346(b) and 2672 of this title for claims for injury or loss of property or personal injury or death resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment and for claims arising under the Constitution of the United States for an act or omission of any employee of the Government while acting within the scope of his office or employment, is exclusive of any other civil action or proceeding arising out of or relating to the same subject matter against the employee whose act or omission gave rise to the claim, or against the estate of such employee, and shall also be deemed an equally effective substitute for any recovery against the employee in his individual capacity directly under the Constitution.".

(b) Subsection (d) of such section is amended to read as follows:

"(d)(1) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the action arose, any such civil action or proceeding commenced in a United States district court shall be deemed an action against the United States under the provisions of this title and all reference thereto, and the United States shall be substituted as the party defendant. After substitution, the United States shall have available all defenses available to the employee and all defenses to which it would have been entitled if the action had originally been commenced against the United States under this chapter and section 1346(b) of this title.

"(2) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the action arose, any such civil action or proceeding commenced in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place wherein it is pending. Such action shall be deemed an action brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. After substitution, the United States shall have available all defenses available to the employee and all defenses to which it would have been entitled if the action had originally been commenced against the United States under this chapter and section 1346(b) of this title. The certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

"(3) The certification by the Attorney General under subsection (d) (1) or (2) that the defendant employee was acting within the scope of his office or employment shall be binding and conclusive, except that in the event that the Attorney General has not certified scope of office or employment, the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment. A copy of the petition shall be served upon the United States in accordance with the provisions of rule 4(d)(4), Federal Rules of Civil Procedure. In the event the petition is filed in a civil action or proceeding pending in a State court, the action or proceeding shall be removed without bond by the Attorney General to the district court of the United States for the district and division embracing the place wherein it is pending. Should the district court determine that the employee was not acting within the scope of his office or employment, the action or proceeding shall be remanded to the State court.

"(4) Where a civil action or proceeding under this chapter is precluded because of the availability of a remedy, compensation, or other benefits from the United States as provided by any other law, the action or proceeding shall be dismissed but in that event, the running of any limitation of time for commencing or filing an application or claim in a proceeding for any other remedy, compensation, or benefits shall be suspended during the pendency of the civil action or administrative proceeding under this chapter.

"(5) Whenever an action brought against a defendant employee in which the United States is substituted as the party defendant under this subsection is dismissed for failure first to present a claim to the appropriate Federal agency pursuant to section 2675(a) of this title, the claim shall be deemed to be timely presented under section 2401(b) of this title, if (A) the claim would have been timely if filed on the date the action against the defendant employee was commenced, and (B) the claim is presented to the appropriate Federal agency within sixty days after dismissal of the action.".

(c) Such section is further amended by adding at the end thereof the following new subsection:

"(f) If a civil action or proceeding under section 1346(b) or 2672 of this title arising under the Constitution of the United States results in a judgment against the United States or an award, compromise, or settlement paid by the United States, the Attorney General shall forward the matter to the head of the department or agency which employed the employee at the time of the act or omission for such further administrative investigation or disciplinary action as may be appropriate.".

SEC. 6. (a) Section 2680 of title 28, United States Code, is amended—

(1) by striking out the section heading and inserting in lieu thereof the following:

"§ 2680. Exceptions; claims not arising under the Constitution of the United States";

(2) by inserting ", relating to tort claims other than those arising under the Constitution of the United States," in the first paragraph immediately after "title"; and

(3) by amending subsection (h) to read as follows:

"(h) Any claim arising out of libel, slander, misrepresentation, deceit, or interference with contract rights.".

(b) The item relating to section 2680 in the table of sections at the beginning of chapter 171 of title 28, United States Code, is amended to read as follows:

"2680. Exceptions; claims not arising under the Constitution of the United States.".

SEC. 7. (a) Chapter 171 of title 28, United States Code, is amended by adding at the end thereof the following new section:

"§ 2681. Exceptions; claims arising under the Constitution of the United States.

"The provisions of this chapter and of section 1346(b) of this title which relate to tort claims arising under the Constitution of the United States shall not apply to actions arising from the activities of the Tennessee Valley Authority, the Panama Canal Company, a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives.".

(b) The table of sections at the beginning of chapter 171 of title 28, United States Code, is amended by adding at the end thereof the following new item:

"2681. Exceptions; claims arising under the Constitution of the United States.".

SEC. 8. (a)(1) Subsections (a) through (d) of section 4116 of title 38, United States Code, are repealed.

(2) Subsection (e) of such section is amended—

(A) by striking out "(e)";

(B) by striking out "person to whom the immunity provisions of this section apply (as described in subsection (a) of this section)," and inserting in lieu thereof "employee of the Veterans' Administration"; and

(C) by striking out "Department of Medicine and Surgery" and inserting in lieu thereof "Veterans' Administration".

(b)(1) Subsections (a) through (e) of section 224 of the Public Health Service Act (42 U.S.C. 233) are repealed.

(2) Subsection (f) of such section is amended by striking out "(f)".

(c)(1) Subsections (a) through (e) of section 1089 of title 10, United States Code, are repealed.

(2) Subsection (f) of such section is amended by striking out "person described in subsection (a)" and inserting in lieu thereof "employee of the armed forces, the Department of Defense, the United States Soldiers' and Airmen's Home, or the Central Intelligence Agency".

(3) Subsection (g) of such section is amended—

(A) by striking out "and" at the end of clause (2);

(B) by redesignating clause (3) as clause (4); and

(C) by inserting after clause (2) the following new clause:

"(3) the Governor of the United States Soldiers' and Airmen's Home, in the case of an employee of the United States Soldiers' and Airmen's Home; and".

(4) Subsections (f) and (g) of such section are redesignated as subsections (a) and (b), respectively.

(d)(1) Subsections (a) through (e) of section 307 of the National Aeronautics and Space Act of 1958 (42 U.S.C. 2458a) are repealed.

(2) Subsection (f) of such section is amended—

(A) by striking out "(f)"; and

(B) by striking out "person described in subsection (a)" and inserting in lieu thereof "employee of the National Aeronautics and Space Administration".

(e)(1) Subsections (a) through (e) of section 1091 of the Foreign Service Act of 1946 (22 U.S.C. 817) are repealed.

(2) Subsection (f) of such section is amended by striking out "person to whom the immunity provisions of subsection (a) of this section apply," and inserting in lieu thereof "employee of the Department of State (including the Agency for International Development)".

(3) Subsections (f) and (g) of such section are redesignated as subsections (a) and (b), respectively.

SEC. 9. Section 2520 of title 18, United States Code, is amended by adding at the end thereof the following new sentence: "This section shall not apply to any civil cause of action against an officer or employee of the United States while acting within the scope of his office or employment.".

SEC. 10. (a) Except as provided in subsection (b), the amendments made by this Act shall apply to all claims, civil actions and proceedings pending on, or filed on or after, the date of enactment of this Act.

(b)(1) With respect to any civil action or proceeding pending on the date of enactment against a Federal employee in his individual capacity, the plaintiff may, upon timely demand, (A) retain his right to a trial by jury if the demand for trial by jury is made prior to or on the date of enactment, or (B) elect a trial by jury if the time for election of a trial by jury pursuant to applicable law has not expired as of the date of enactment, except that in any case in which a trial by jury is elected under this paragraph, the provisions of section 2674(c) of this title, as added by section 3 of this Act, which relate to liquidated damages, shall not apply.

(2) With respect to any civil action or proceeding pending against a Federal employee in his individual capacity on appeal, or pending against a Federal employee in his individual capacity in a State court in which the time for removal pursuant to section 2679(d) of this title has expired, the amendments made by this Act shall not apply, except that the United States shall be substituted for the defendant employee upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the action or proceeding arose.

(3) The provisions of section 2675(a) of this title shall not apply to a civil action or proceeding against a Federal employee in his individual capacity pending on the date of enactment of this Act, if the provisions of section 2675(a) were inapplicable to the action or proceeding when filed.

APPENDIX 1

The Federal Tort Claims Act [1]

Note: The basic provisions of the Federal Tort Claims Act appear in 28 USC §§ 1346(b), 2671–2680. Also included in this Appendix, however, are other statutory provisions which have direct relevance to the Act.

The Regulations of the Attorney General and of the federal agencies relating to claims under the Act are set forth in Appendices 38–40, *infra.*

Various sections of the Tort Claims Act were amended in 1966. [1] Those amendments apply *only* to claims accruing on and after January 18, 1967. [2] Claims accruing prior to that date are governed by the former language of the Act. The content of the 1966 amendments is incorporated into the text of the Act as set forth below. The pre-1966 language is set forth in italics in footnotes keyed to each section which was amended in 1966. This Appendix includes the following sections of the U.S. Code:

5 USC § 3374.	Assignments of employees from State or local governments.
7 USC § 943.	[Rural Telephone Bank] Special provisions governing telephone bank as a Federal agency until conversion of ownership, control, and operation.
15 USC § 2053.	Consumer Product Safety Commission
16 USC § 558c.	Volunteers in the National Forests Program; employment status of volunteers.
22 USC § 817.	Malpractice protection
22 USC § 2504[h].	Peace Corps Volunteers; tort claims.
28 USC § 1291.	Final decisions of district courts.
28 USC § 1346.	United States as defendant.
28 USC § 1402.	United States as defendant.
28 USC § 1504.	Tort claims.
28 USC § 2110.	Time for appeal to Court of Claims in tort claims cases.

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[1] PL 89–506, 80 Stat 306 (1966).

[2] Section 10, PL 89–506, 80 Stat 308, provides, "This Act shall apply to claims accruing six months or more after the date of its enactment." The date of enactment was July 18, 1966.

28 USC § 1291. Final decisions of district courts.

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

* * * * *

28 USC § 1346. United States as defendant.

* * * * *

(b) Subject to the provisions of chapter 171 [3] of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

(c) The jurisdiction conferred by this section includes jurisdiction of any set-off, counterclaim, or other claim or demand whatever on the part of the United States against any plaintiff commencing an action under this section.

(d) The district courts shall not have jurisdiction under this section of:

(1) Any civil action or claim for a pension;

(2) Any civil action or claim to recover fees, salary, or compensation for official services of officers or employees of the United States.

* * * * *

28 USC § 1402. United States as defendant.

* * * * *

(b) Any civil action on a tort claim against the United States under

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[3] Chapter 171 of Title 28 comprises sections 2671–2680, set out below in this Appendix.

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subsection (b) of section 1346 of this title may be prosecuted only in the judicial district where the plaintiff resides or wherein the act or omission complained of occurred.

* * * * *

28 USC § 1504. Tort claims.[4]

The Court of Claims shall have jurisdiction to review by appeal final judgments in the district courts in civil actions based on tort claims brought under section 1346(b) of this title if the notice of appeal filed in the district court has affixed thereto the written consent on behalf of all the appellees that the appeal be taken to the Court of Claims.

28 USC § 2110. Time for appeal to Court of Claims in tort claims cases.

Appeals to the Court of Claims in tort claims cases, as provided in section 1504 of this title, shall be taken within ninety days after the entry of the final judgment of the district court.

* * * * *

28 USC § 2401. Time for commencing action against United States.[5]

* * * * *

(b) A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

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[4] Concerning appeals in Federal Tort Claims Act suits, see also 28 USC § 1291, *supra.*

[5] Amended in 1966; see *Note*, p. A–4, *supra.* Prior to the 1966 amendment, the text of § 2401(b) was as follows:

> *(b) A tort claim against the United States shall be forever barred unless action is begun within two years after such claim accrues or within one year after the date of enactment of this amendatory sentence, whichever is later, or unless, if it is a claim not exceeding $2,500, it is presented in writing to the appropriate Federal agency within two years after such claim accrues or within one year after the date of enactment of this amendatory sentence, whichever is later. If a claim not exceeding $2,500 has been presented in writing to the appropriate Federal agency within that period of time, suit thereon shall not be barred until the expiration of a period of six months after either the date of withdrawal of such claim from the agency or the date of mailing notice by the agency of final disposition of the claim.*

28 USC § 2402. Jury trial in actions against United States.

Any action against the United States under section 1346 shall be tried by the court without a jury, except that any action against the United States under section 1346(a)(1) shall, at the request of either party to such action, be tried by the court with a jury.

* * * * *

28 USC § 2411. Interest.[6]

(a) In any judgment of any court rendered (whether against the United States, a collector or deputy collector of internal revenue, a former collector or deputy collector, or the personal representative in case of death) for any overpayment in respect of any internal-revenue tax, interest shall be allowed at an annual rate established under section 6621 of the Internal Revenue Code of 1954 upon the amount of the overpayment, from the date of the payment or collection thereof to a date preceding the date of the refund check by not more than thirty days, such date to be determined by the Commissioner of Internal Revenue. The Commissioner is authorized to tender by check payment of any such judgment, with interest as herein provided, at any time after such judgment becomes final, whether or not a claim for such payment has been duly filed, and such tender shall stop the running of interest, whether or not such refund check is accepted by the judgment creditor.

(b) Except as otherwise provided in subsection (a) of this section, on all final judgments rendered against the United States in actions instituted under section 1346 of this title, interest shall be computed at the rate of 4 per centum per annum from the date of the judgment up to, but not exceeding, thirty days after the date of approval of any appropriation Act providing for payment of the judgment.

* * * * *

28 USC § 2412. Costs.

Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title but not including the fees and expenses of attorneys may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or official of the United States acting in his official capacity, in any court having jurisdiction of such action. A judgment for costs when taxed against the Government shall, in an amount established by statute or court rule or order, be limited to reimbursing in whole or in part the prevailing party for the costs incurred by him in the litigation. Payment of a judgment for costs shall be as provided in section 2414 and section 2517 of this title for the payment of judgments against the United States.

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[6] Concerning interest, see also 31 USC § 724(a), *infra*.

* * * * *

28 USC § 2414. Payment of judgments and compromise settlements. [7]

Except as provided by the Contracts Disputes Act of 1978, payment of final judgments rendered by a district court against the United States shall be made on settlements by the General Accounting Office. Payment of final judgments rendered by a State or foreign court or tribunal against the United States, or against its agencies or officials upon obligations or liabilities of the United States, shall be made on settlements by the General Accounting Office after certification by the Attorney General that it is in the interest of the United States to pay the same.

Whenever the Attorney General determines that no appeal shall be taken from a judgment or that no further review will be sought from a decision affirming the same, he shall so certify and the judgment shall be deemed final.

Except as otherwise provided by law, compromise settlements of claims referred to the Attorney General for defense of imminent litigation or suits against the United States, or against its agencies or officials upon obligations or liabilities of the United States, made by the Attorney General or any person authorized by him, shall be settled and paid in a manner similar to judgments in like causes and appropriations or funds available for the payment of such judgments are hereby made available for the payment of such compromise settlements.

28 USC § 2671. Definitions. [8]

As used in this chapter and sections 1346(b) and 2401(b) of this title, the term—

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[7] See also 28 USC § 2672, *infra* this Appendix, and 31 USC § 724a, *infra* this Appendix.

[8] Amended in 1966; see *Note*, p. A–4, *supra*. Text of the second paragraph of § 2671, prior to its 1966 amendment, was as follows:

> *"Federal agency" includes the executive departments and independent establishment of the United States, and corporations primarily acting as, instrumentalities or agen-*

"Federal agency" includes the executive departments, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States.

"Employee of the government" includes officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

"Acting within the scope of his office or employment," in the case of a member of the military or naval forces of the United States, means acting in line of duty.

28 USC § 2672. Administrative adjustment of claims.[9]

The head of each Federal agency or his designee, in accordance with regulations prescribed by the Attorney General, may consider, ascertain, adjust, determine, compromise, and settle any claim for money damages against the United States for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the agency while acting within the scope of his office or employment under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred: Provided, That any award, compromise, or settlement in excess of $25,000 shall be effected only with the prior written approval of the Attorney General or his designee.

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cies of the United States but does not include any contractor with the United States.

[9] Amended in 1966; see *Note*, p. A–4, *supra*. Text of the heading and of the first three paragraphs of § 2672, prior to their 1966 amendments, was as follows:

> *§ 2672. Administrative adjustment of claims of $2,500 or less.*
>
> *The head of each federal agency, or his designee for the purpose, acting on behalf of the United States, may consider, ascertain, adjust, determine, and settle any claim for money damages of $2,500 or less against the United States accruing on and after January 1, 1945, for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.*
>
> *Subject to the provisions of this title relating to civil actions on tort claims against the United States, any such award or determination shall be final and conclusive on all officers of the government, except when procured by means of fraud.*
>
> *Any award made pursuant to this section, and any award, compromise, or settlement made by the Attorney General pursuant to section 2677 of this title, shall be paid by the head of the federal agency concerned out of appropriations available to such agency.*

Subject to the provisions of this title relating to civil actions on tort claims against the United States, any such award, compromise, settlement, or determination shall be final and conclusive on all officers of the Government, except when procured by means of fraud.

Any award, compromise, or settlement in an amount of $2,500 or less made pursuant to this section shall be paid by the head of the Federal agency concerned out of appropriations available to that agency. Payment of any award, compromise, or settlement in an amount in excess of $2,500 made pursuant to this section or made by the Attorney General in any amount pursuant to section 2677 of this title shall be paid in a manner similar to judgments and compromises in like causes and appropriations or funds available for the payment of such judgments and compromises are hereby made available for the payment of awards, compromises, or settlements under this chapter.

The acceptance by the claimant of any such award, compromise, or settlement shall be final and conclusive on the claimant, and shall constitute a complete release of any claim against the United States and against the employee of the government whose act or omission gave rise to the claim by reason of the same subject matter.

28 USC § 2673. Repealed.[10]

28 USC § 2674. Liability of United States.

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

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[10] This section, relating to agency reports to Congress of claims adjusted administratively, was repealed in 1965. The former language appears in 28 USC § 2673 (1964 ed.) and in substance is the same as section 404 of the Legislative Reorganization Act of 1946, set out in Appendix 2, *infra*.

28 USC § 2675. Disposition by federal agency as prerequisite; evidence.[11]

(a) An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section. The provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, cross-claim, or counterclaim.

(b) Action under this section shall not be instituted for any sum in excess of the amount of the claim presented to the federal agency, except where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time of presenting the claim to the federal agency, or upon allegation and proof of intervening facts, relating to the amount of the claim.

(c) Disposition of any claim by the Attorney General or other head of a federal agency shall not be competent evidence of liability or amount of damages.

28 USC § 2676. Judgment as bar.

The judgment in an action under section 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim.

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[11] Amended in 1966; see *Note*, p. A-4, *supra*. The text of § 2675(a) and (b), prior to its 1966 amendment, was as follows:

> *(a) An action shall not be instituted upon a claim against the United States which has been presented to a federal agency, for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of an employee of the government while acting within the scope of his authority, unless such federal agency has made final disposition of the claim.*
>
> *(b) The claimant, however, may, upon fifteen days written notice, withdraw such claim from consideration of the federal agency and commence action thereon. Action under this section shall not be instituted for any sum in excess of the amount of the claim presented to the federal agency, except where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time of presenting the claim to the federal agency, or upon allegation and proof of intervening facts, relating to the amount of the claim.*

28 USC § 2677. Compromise.[12]

The Attorney General or his designee may arbitrate, compromise, or settle any claim cognizable under section 1346(b) of this title, after the commencement of an action thereon.

28 USC § 2678. Attorney fees; penalty.[13]

No attorney shall charge, demand, receive, or collect for services rendered, fees in excess of 25 per centum of any judgment rendered pursuant to section 1346(b) of this title or any settlement made pursuant to section 2677 of this title, or in excess of 20 per centum of any award, compromise, or settlement made pursuant to section 2672 of this title.

Any attorney who charges, demands, receives, or collects for services rendered in connection with such claim any amount in excess of that allowed under this section, if recovery be had, shall be fined not more than $2,000 or imprisoned not more than one year, or both.

28 USC § 2679. Exclusiveness of remedy.[14]

(a) The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive.

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[12] Amended in 1966; see *Note*, p. A–4, *supra*. The text of § 2677 prior to its 1966 amendment was as follows:

> *The Attorney General, with the approval of the court, may arbitrate, compromise, or settle any claim cognizable under section 1346(b) of this title, after the commencement of an action thereon.*

[13] Amended in 1966; see *Note*, p. A–4, *supra*. The text of the first paragraph of § 2678, prior to its 1966 amendment, was as follows:

> *The court rendering a judgment for the plaintiff pursuant to section 1346(b) of this title, or the head of the federal agency or his designee making an award pursuant to section 2672 of this title, or the Attorney General making a disposition pursuant to section 2677 of this title, may, as a part of such judgment, award, or settlement, determine and allow reasonable attorney fees, which, if the recovery is $500 or more, shall not exceed 10 per centum of the amount recovered under section 2672 of this title, or 20 per centum of the amount recovered under section 1346(b) of this title, to be paid out of but not in addition to the amount of judgment, award, or settlement recovered, to the attorneys representing the claimant.*

[14] Amended in 1966; see *Note*, p. A–4, *supra*. The text of § 2679(b), prior to its 1966 amendment, was as follows:

> *(b) The remedy by suit against the United States as provided by section 1346(b) of this title for damage to property or for personal injury, including death, resulting from the operation by any employee of the Government of any motor vehicle while acting within the scope of his office or employment, shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against the employee or his estate whose act or omission gave rise to the claim.*

(b) The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property or personal injury or death, resulting from the operation by any employee of the Government of any motor vehicle while acting within the scope of his office or employment, shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against the employee or his estate whose act or omission gave rise to the claim.

(c) The Attorney General shall defend any civil action or proceeding brought in any court against any employee of the Government or his estate for any such damage or injury. The employee against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon him or an attested true copy thereof to his immediate superior or to whomever was designated by the head of his department to receive such papers and such person shall promptly furnish copies of the pleadings and process therein to the United States attorney for the district embracing the place wherein the proceeding is brought, to the Attorney General, and to the head of his employing Federal agency.

(d) Upon a certification by the Attorney General that the defendant employee was acting within the scope of his employment at the time of the incident out of which the suit arose, any such civil action or proceeding commenced in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place wherein it is pending and the proceedings deemed a tort action brought against the United States under the provisions of this title and all references thereto. Should a United States district court determine on a hearing on a motion to remand held before a trial on the merits that the case so removed is one in which a remedy by suit within the meaning of subsection (b) of this section is not available against the United States, the case shall be remanded to the State court.

(e) The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677, and with the same effect.

28 USC § 2680. Exceptions.

The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the

Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

(d) Any claim for which a remedy is provided by sections 741–752, 781–790 of Title 46, [15] relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1–31 of Title 50, Appendix. [16]

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

(g) Repealed. [17]

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided,* That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purposes of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law." [17.1]

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[15] The references are to the Suits in Admiralty Act and the Public Vessels Act.

[16] The reference is to the Trading With the Enemy Act.

[17] The language of subsection (g), which has since been repealed, appears in section 421(g) of the Legislative Reorganization Act of 1946, set out in Appendix 2, *infra.*

[17.1] Amended in 1974: all words in the subsection, beginning with the word "*Provided,*" were added by PL 93–253, 88 Stat 50, approved March 16, 1974.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives.

29 USC § 938. Application of provisions of Federal law. [17.2]

(a) * * *

(3) For purposes of the Federal tort claims provisions in Title 28 enrollees [in the Job Corps] shall be considered employees of the Government.

DEPARTMENT AND AGENCY VIEWS

STATEMENT OF
A. JAMES BARNES, GENERAL COUNSEL
UNITED STATES DEPARTMENT OF AGRICULTURE

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE:

I am pleased to be able to provide this statement in support of S.1775, which would amend the Federal Tort Claims Act by providing that the United States shall be the exclusive defendant in all torts involving actions of Government employees taken within the scope of their employment. The proposed legislation would, among other things, free Federal employees of liability for constitutional torts committed in the line of duty, and make the United States liable for such torts. This Department has consistently supported the concept of immunizing Government employees from personal liability arising out of actions taken within the scope of their employment. Therefore, we strongly support adoption of S.1775.

In Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971), the Supreme Court allowed private parties to recover damages against individual Government employees alleged to have violated their constitutional rights and in Butz v. Economou, 438 U.S. 478 (1978), the Court substantially diminished the scope of judicially created immunity. Consequently, in recent times Government employees who deal with or take actions affecting the public run a substantial risk of being sued personally for alleged violations of constitutional rights. While the number of money judgments obtained as a result of constitutional tort actions have been few (nine to our knowledge for the entire Federal government), numerous employees of this and other agencies have been subjected to the anxiety and burden of litigation seeking to hold them personally liable for action taken while acting as Government employees.

We believe the vast majority of employees of this Department try not to let the risk of personal liability affect their judgment as to the proper execution of their duties. It is unrealistic, however, to conclude that in no instance has the threat of personal liability significantly restrained good faith action in the public interest. As the number of suits alleging constitutional torts continues to increase and employees become more aware of the burden imposed upon them by being named a defendant in a constitutional tort action, the risk of substantial harm to the decisionmaking processes of the Government increases.

We agree with the Department of Justice that the present state of the law disserves the victims of violations of constitutional rights. It would often be difficult to collect a substantial judgment against an individual Government employee. Furthermore, because of the fact that any settlement must be paid by the individual Government employee, the possibility of settling these actions is severely limited. Therefore, in many cases the Government must spend tens if not hundreds of thousands of dollars in salary costs or payments to outside attorneys to litigate cases that could be settled for a fraction of the costs of the litigation.

This Department has been particularly concerned about the present state of the law because we have a large number of employees who deal with the public or make decisions affecting the public, thus subjecting them to potential personal liability. One of the few judgments handed down against a Government employee in a constitutional tort action came in a suit against Robert C. Lehman, an employee of the Forest Service. Mr. Lehman's testimony before this Subcommittee graphically highlighted the substantial risks faced by Government employees in carrying out their duties. In addition to the numerous employees of the Forest Service, other Department employees daily run the risk that members of the public aggrieved by their decisions will sue them personally, as they engage in inspection and grading of meat, poultry, grain, fruit, vegetables, and other agricultural crops, provide technical advice and assistance concerning farming, raising livestock, construction and repair of housing, management of land and nutrition, and regulate the production and handling of numerous food products. All of these employees are subject to the burden of being sued individually every time they make any decision affecting an outside party. Thus, we believe that legislation providing immunity from personal liability is desirable to protect the integrity of Government decisionmaking. We believe S.1775 strikes a fair balance by immunizing individual employees while giving individuals whose constitutional rights may have been violated a cause of action against the United States.

We would also like to take this opportunity to endorse the suggestion of the Department of Justice that the Federal Tort Claims Act be amended to increase the authority of Government agencies to settle claims administratively without the necessity of seeking approval from the Department of Justice. We believe the policy considerations that lead Congress to grant agencies this authority still apply and that revising the figure from $25,000 to $50,000 simply adjusts the appropriate level to reflect the effects of inflation.

In summary, we strongly support S.1775 in the belief that passage would result in both Government employees and potential claimants being treated far more justly than current law provides.

STATEMENT OF

VERNE ORR

SECRETARY OF THE AIR FORCE

Mr. Chairman and Members of the Subcommittee:

I am pleased to have the opportunity to present the views of the Department of the Air Force on S. 1775. This important legislation would provide protection from personal liability in tort actions for federal employees who are acting within the scope of their offices or employment by substituting the United States as the sole party defendant. We strongly support S. 1775 and urge its early enactment.

In his testimony before your Subcommittee, Mr. Taft, the General Counsel of the Department of Defense, provided a detailed analysis of the need for S. 1775. The Air Force fully endorses his testimony.

Rather than reiterating Mr. Taft's rationale for supporting S. 1775, I would like to discuss the need for this legislation from the perspective of the Air Force. I am particularly concerned about the distortion of the decision-making process by Air Force commanders which could result from the threat of personal liability. Because of the breadth of exposure of military commanders, the "chilling effect" of litigation against them is more serious in the military than any where else in the government. This is the one area in which timid decision-making could have disastrous consequences.

Air Force commanders at all levels are responsible for aircraft, extremely hazardous weapons and fuels, thousands of military and civilian personnel and their dependents, and the security of equipment and military installations which are vital to national security, all in an age of increasing terrorism. The heavy responsibilities of military commanders often demand instant decisions which must be made unhindered by concern for the possibility of personal liability. For example, a commander and the security personnel in his command must be able to detain an intruder who might threaten the security of a military installation without fear of being sued for false arrest. Military circumstances often demand decisions which do not allow time for detached reflection or for consultation with an experienced tort litigation attorney.

It is also important to recognize that commanders of typical Air Force bases are responsible for not only direct military mission activities, but also for a multitude of ancillary functions which increase the risk of suit far above that of the typical Federal official. They run fire departments and police forces, manage housing areas and transportation systems, and oversee complexes of retail stores, restaurants, and recreational facilities.

Military commanders bear the risk of potential suit from retirees, civilian employees, dependents of military personnel and civilian employees, contractor employees, and local citizens who visit military bases. Although Feres v. United States provides protection against suits brought by or on behalf of military members, even this defense is often challenged in litigation. Moreover, most of the cases are brought by civilians, so that Feres is not available as a defense. Thus the personal risk of tort litigation for military commanders and their subordinate military and civilian personnel is very high. When one looks at the responsibilities we ask our military commanders to shoulder, it is only right that they be shielded from personal liability.

Although actual liability for money damages is obviously an important consideration, the most serious aspect of a suit for personal liability is the individual's anxiety over the litigation and his legitimate concern about financial disaster. When the result is timid decision-making, dispirited personnel, and wasted time and resources, it is to the detriment of the Government and its effective management.

The case examples included in Mr. Taft's statement demonstrate the impact these cases have on military members and civilian employees. One other Air Force case is illustrative. This is a case in which the trial judge recently granted our motion for summary judgment, but which we expect to be appealed. The case involves two Non-Commissioned Officers' Club employees, two security policemen, and one Office of Special Investigation's (OSI) agent who were sued individually in 1979 as a result of an investigation of threatening phone calls. As a result of the calls which were reported by the Club employees, the suspected caller was detained and questioned by the security policemen and the OSI agent. The suspected caller later filed suit alleging that the defendants recklessly caused her to be accused and then willfully detained her.

When the defendants gathered in Colorado for trial last month, the security policemen had to travel from their new duty stations at March Air Force Base, California and Offutt Air Force Base, Nebraska. Fortunately one had returned from an interim assignment in Korea. The OSI agent had retired and returned for trial, without Air Force funding, from his new home in Georgia. On the scheduled day of trial, we received calls at Air Force headquarters initiated in both security police and OSI channels, indicating that the defendants had made casual visits to their old units at the base in Colorado where the case arose. Based on discussions regarding the trial about to commence, the personnel at the base expressed serious concerns over their own potential personal liability. We were urgently asked to provide background materials so the legal office at the base could respond to inquiries on the question of personal liability. Thus, the suit had a very predictable result -- the Air Force members were sued individually for doing their job, and those around them will now perform their duties with a shared sense of apprehension which could affect the diligent pursuit of their federal responsibilities.

Enactment of S. 1775 will provide a much needed solution to this increasingly difficult problem. The Air Force currently has 18 open cases which involve potential personal liability of Air Force military and civilian officials. We need to provide our employees with a shield to protect them from the danger of personal liability so they can go about their important business unhindered. As for those employees who abuse their offices, an appropriate mechanism for dealing with such employees exists in the bill. We strongly support that approach to the issue of disciplinary action.

In summary, the Air Force believes that the problem of personal liability is serious and needs a solution. S. 1775 provides that solution and we strongly urge its prompt and favorable consideration by the Subcommittee.

DEPARTMENT OF THE AIR FORCE
WASHINGTON, D C 20330

OFFICE OF THE SECRETARY

AUG 3 1981

Honorable David A. Stockman
Director, Office of
Management and Budget

Dear Mr. Director:

The Chairman, Committee on the Judiciary, United States Senate, has requested the views of the Department of the Air Force with respect to S. 16, 97th Congress, a bill "For the relief of Technical Sergeant Herman F. Baca, United States Air Force."

The Department of the Air Force requests advice as to whether there is objection to the submission of the attached report to the committee.

Your expeditious action is requested inasmuch as the Senate Judiciary Committee will be holding hearings soon. This confirms telephone conversation with Greg Jones and Susie Ezzell on July 30, 1981.

Sincerely,

ROBERT W. JONES, Colonel, USAF
Chief, Legislation Division
Office of Legislative Liaison

Attachment

DEPARTMENT OF THE AIR FORCE
WASHINGTON, D.C. 20330

OFFICE OF THE SECRETARY

Dear Mr. Chairman:

This is in reply to your letter to the Secretary of the Air Force requesting the views of the Department of the Air Force with respect to S. 16, 97th Congress, a bill "For the relief of Technical Sergeant Herman F. Baca, United States Air Force."

S. 16 would direct the Secretary of the Treasury to pay out of funds not otherwise appropriated Sergeant Herman F. Baca, United States Air Force, the sum of $8,703.42. Such payment would be in full settlement of any claims on the part of Sergeant Baca against the United States arising out of the uncompensated portion of the loss suffered when his household goods were destroyed by a fire at his assigned quarters at Offutt AFB, Nebraska, on March 1, 1975. The $8,703.42 represents the difference between the depreciated value of the property loss of $23,703.42 and the sum of $15,000, the maximum payable, and the amount paid to Sergeant Baca, under the Military Personnel and Civilian Employees' Claims Act of 1964 (31 U.S.C. 241, et seq).

While the Air Force regrets Sergeant Baca's loss and the resulting hardship suffered by his family, it cannot support the proposed bill. Sergeant Baca has provided no compelling reasons to make him an exception to the statutory limitation of $15,000 authorized by the Military Personnel and Civilian Employees' Claims Act of 1964, as amended, and settlement of claims under this authority is by the terms of the statute "final and conclusive." See 31 U.S.C. 242. Enactment of the subject bill would be contrary to the clear purpose of this language. It would be inappropriate to accord such preferential treatment to one military member while denying the same treatment to other members who are similarly situated.

The enactment of S. 16 would not cause a significant increase in budgetary requirements.

This report has been coordinated within the Department of the Defense in accordance with procedures prescribed by the Secretary of Defense.

The Office of Management and Budget advises that, from the standpoint of the Administration's program, there is no objection to the presentation of this report for the consideration of the Congress.

Sincerely,

DEPARTMENT OF THE ARMY
WASHINGTON, D.C. 20310

DEC [illegible] 1981

Honorable Charles E. Grassley
Chairman, Subcommittee on Agency
  Administration
Committee on the Judiciary
United States Senate

Dear Mr. Chairman:

On November 16, 1981, your Subcommittee received testimony from Department of Defense General Counsel William H. Taft, IV, on S. 1775, 97th Congress, a bill "To amend title 28 of the United States Code to provide for an exclusive remedy against the United States in suits based upon acts or omissions of U.S. employees, to provide a remedy against the United States with respect to constitutional torts, and for other purposes." The Department of the Army had also been invited to testify, but since Mr. Taft's testimony expressed the views of the entire Department of Defense, it was not considered appropriate that the Department of the Army present separate testimony. However, to the extent that the Department of the Army, and in particular, the Corps of Engineers, have been involved in somewhat unique type of litigation which would be affected by the enactment of S. 1775, we wish to submit the following report for the consideration of the Committee.

The purpose of S. 1775 is to protect federal employees from lawsuits brought against them in their individual capacities for tortious acts committed within the scope of their employment. This is accomplished by substituting the

United States as party defendant in Bivens[1] or "Constitutional" tort cases, and by expanding the Federal Tort Claims Act to make suit against the United States a plaintiff's exclusive remedy for common law torts committed by Government employees within the United States.

Recent years have seen a phenomenal increase in the number of suits brought against individual federal employees. The expansion of the Bivens doctrine, and the concomitant prospect of personal liability for many types of actions taken within the scope of employment, have seriously impaired the ability of many employees to fulfill their duties effectively. This problem compels the conclusion that some type of remedy must be made available against the United States for official decisions which are alleged to have deprived some individual of a Constitutional right.

The extension of the Federal Tort Claims Act to protect employees from individual liability for other torts is of equal importance. At present, suit against the United States is a plaintiff's exclusive remedy under the Drivers' Act, 28 U.S.C. 2679(b), only if the federal employee's alleged negligence involved his operation of a motor vehicle within the scope of his employment. This limitation leads to the anomalous situation of protecting employees driving trucks and cars, but exposing employees operating tools or heavy machinery to the prospect of lawsuits brought against them individually. The Department of the Army believes that the considerations which orginally prompted the enactment of the Drivers' Act apply just as forcefully to extending that Act's coverage to other torts committed by federal employees.

Currently, the United States' support of individually sued employees is limited to providing Justice Department representation for the defendants and, if a judgment is rendered against the United States as well as an individual defendant, paying the judgment. This is of little solace to an employee faced with the possibility of having to personally satisfy a judgment of tens or even hundreds of thousands of dollars if the United States is not sued or is dismissed as a defendant.

Several recent suits against four Corps of Engineers employees have dramatically illustrated the problems such lawsuits cause. In October 1979, a drill rig mounted on a 2 1/2 ton truck lost traction on the slope of a dam in Puerto Rico and rolled into a bulldozer, injuring an employee. In October 1980, the injured man brought suit against the truck and bulldozer operators, a supervisory geologist and the Resident Engineer in charge of construction.

Although lawsuits were dismissed recently by stipulation, widespread knowledge of these cases has seriously affected the morale of hundreds of Corps employees in the Southeastern United States. Problems voiced by some of these employees included the impossibility of obtaining insurance coverage and reluctance to direct subordinates to perform potentially dangerous tasks. On a more fundamental level, anger over the United States' failure to protect these defendants caused some employees to question the desirability of remaining in federal service.

These cases also highlight the fact that almost no government employee is safe from the prospect of being sued individually. The problem can affect both supervisory white-collar officials and blue-collar laborers. Indeed, blue-collar workers may be more exposed to ultimate liability than their white-collar counterparts, who have available to them the defense of qualified immunity for discretionary acts. It is ironic that blue-collar workers, whose activities are overwhelmingly ministerial in nature, may well have greater contact with the public and more hazardous jobs than the official whose discretionary functions bring the immunity defense into operation.

Enactment of S. 1775 would ensure adequate protection of employees who face the risks of potentially devastating lawsuits. Furthermore, it would do so without interfering with the government's authority to discipline its employees for negligent or wreckless conduct, thereby insuring the accountability of the employee. Accordingly, the Department of the Army strongly supports enactment of S. 1775.

This report has been coordinated within the Department of Defense in accordance with procedures prescribed by the Secretary of Defense.

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[1] Bivens v. Six Unknown Named Agents of FBN, 403 U.S. 388 (1971).

The Office of Managment and Budget advises that, from the standpoint of the Administration's program, there is no objection to the presentation of this report for the consideration of the Committee.

Sincerely,

W R Gianelli

William R. Gianelli
Assistant Secretary of the Army
(Civil Works)

Department of Energy
Washington, D.C. 20585

December 30, 1981

Honorable Charles E. Grassley
Chairman, Subcommittee on
Agency Administration
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This is in response to your request for the views of the Department of Energy on S. 1775, a bill "[t]o amend title 28 of the United States Code to provide for an exclusive remedy against the United States in suits based upon acts or omissions of United States employees, to provide a remedy against the United States with respect to constitutional torts, and for other purposes."

S. 1775 would make the Federal Government the exclusive defendant in all tort suits involving Federal employees acting within the scope of their employment. The Federal Tort Claims Act currently makes the Government liable for negligence or wrongful acts or omissions committed by Federal employees while acting within the scope of their employment, with certain specifically enumerated exceptions. However, the employee, as well as the United States, may be sued for misconduct, thereby exposing the employee to significant personal liability and uncertainty.

The Department strongly supports the concept of absolute immunity for government officials acting within the scope of their authority, to protect them against claims that the present law allows. Officials in this Department have been particularly susceptible to vexatious suits. This has had undesirable effects on public policy decision-making. Many decision-makers may be reluctant to assume an aggressive role in discharging official duties because of the fear of litigation resulting from their actions. No matter what elaborate measures are taken to accommodate competing interests, most decisions cannot satisfy all interested parties and the decision-maker may then be faced with potential law suits. Moreover, no general provision exists in current law for indemnification of a sued Federal official.

The Department of Energy supports enactment of S. 1775 but defers to the Department of Justice for detailed comments on the bill.

The Office of Management and Budget has advised that, from the standpoint of the President's program, there is no objection to presentation of this report for the consideration of the Committee.

Sincerely,

R. Tenney Johnson

R. Tenney Johnson
General Counsel

THE SECRETARY OF HEALTH AND HUMAN SERVICES
WASHINGTON, D.C. 20201

DEC 11 1981

The Honorable Charles E. Grassley
Chairman, Subcommittee on Agency
  Administration
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

I appreciate the opportunity to present to your Subcommittee the position of the Department of Health and Human Services in support of S. 1775, a bill "To amend title 28 of the United States Code to provide for an exclusive remedy against the United States in suits based upon acts or omissions of United States employees, to provide a remedy against the United States with respect to constitutional torts and for other purposes."

We heartily endorse the testimony of Deputy Attorney General Everett C. Schmults who provided your Subcommittee with the Administration's position on S. 1775. The experience of this Department supports his conclusion that recent judicial developments respecting the liability of Federal employees for so-called constitutional torts requires a Congressional response. As in other Federal agencies, officials of this Department have been subject to vexatious and spurious lawsuits against them in their individual capacities based on the conduct of their official duties. Such developments cannot help but make Federal officials overly cautious and justifiably anxious concerning the discharge of their responsibilities.

The enactment of S. 1775 would protect Federal employees from suits for money damages arising out of constitutional torts allegedly committed in the performance of their official duties, while at the same time providing the victims of constitutional torts and most common law torts committed by Federal employees a remedy against the United States. The bill would integrate into a cohesive structure within the existing format of the Federal Tort Claims Act the government's exclusive liability for constitutional torts and most common law torts. In doing so, we believe it would also lessen the increasing number of spurious claims filed against Federal employees in their individual capacities.

Employees of this Department have been subjected to a wide range of lawsuits against them individually. Employees are required to make decisions in disciplinary and other personnel actions respecting subordinate employees, to perform investigatory functions, to conduct food and drug inspection and seizure activities, to make decisions respecting the denial or termination of benefits or contracts, and to maintain a wide variety of records respecting the medical and other personal information about individuals. All of these activities can and do give rise to allegations of constitutional torts. We believe employees who are engaged in these functions need and deserve the protection that would be provided by S. 1775.

In our view this bill is superior to those previously introduced to deal with this problem. The bill provides, for example, that in any suit in which the United States becomes liable for the constitutional tort of an individual, the United States could assert all of the defenses available to the employee if he had been sued personally, thus making clear that there is no absolute liability in such cases. We also favor the amendments made by section 5 of the bill that would provide that the Attorney General's certification of scope of employment would be binding and conclusive on the courts. We have experienced occasions in which a court has refused to accept a government's certification of scope of employment where, because of the time limits for filing Federal tort claims, no remedy would have been available against the United States. The bill would resolve this problem by providing that the statutory time limits would not bar an action if the claim would have been timely filed on the date the action against the defendant employee was commenced.

No employee should have to bear the financial and emotional burden of charges that arise out of the conscientious execution of his or her official duties. Since there is no present authority to hold an employee harmless in such cases or to provide liability insurance, employees whose work exposes them to controversy and confrontation must now suffer the anxiety of potential personal liability. S. 1775 would correct this situation with respect to constitutional torts and most common law torts, and we, therefore, urge your Subcommittee to give that bill your prompt and favorable consideration.

We are advised by the Office of Management and Budget that there is no objection to the presentation of these views from the standpoint of the Administration's program.

Sincerely,

Richard S. Schweiker
Secretary

THE SECRETARY OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, D.C. 20410

November 30, 1981

Honorable Charles E. Grassley, Chairman
Subcommittee on Agency Administration
Committee on the Judiciary
United States Senate
Washington, D. C. 20510

Dear Senator Grassley:

This responds to your letter of October 28, requesting the views of this Department on legislation (S. 1775) you have introduced to amend the Federal Tort Claims Act. 28 U.S.C. §§2671-2680.

The Department of Housing and Urban Development fully endorses S. 1775 and strongly supports its enactment. S. 1775 is the direct bipartisan successor to legislation previously advocated by Democratic and Republican Administrations alike. This legislation would relieve individual Federal employees from the threat of potential personal liability based upon actions taken within the scope of their official job responsibilities.

Under S. 1775, the United States would become the exclusive defendant in all intentional, common law tort actions and in all tort actions asserting violations of constitutional rights, based upon the acts or omissions of Federal employees during the performance of their duties.

S. 1775 is necessitated by the expanding caselaw which has evolved since the Supreme Court's decision in Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971). There, the Court held that Federal employees could be subjected to personal liability in actions for damages based upon a violation of a citizen's Fourth Amendment rights. The Court has since expanded this "constitutional tort" concept to include violations of the Fifth and Eighth Amendments as well. Davis v. Passman, 442 U.S. 228 (1979); Carlson v. Green, 446 U.S. 14 (1980). (Further, lower Federal courts have applied the constitutional tort theory to claims based upon a variety of other constitutional rights, including those protected in the First Amendment.)

In addition, because of a specific exception in the Federal Tort Claims Act, an individual Federal employee is subject to a civil action for damages where the claim is based upon an intentional, common law tort. (Such as: assault, battery, false imprisonment, false arrest, malicious prosecution, and abuse of process.) 28 U.S.C. §2680(h). S. 1775 would also modify this exception.

Clearly, Bivens-type suits or suits based upon intentional common law torts are not limited to incidents arising out of law enforcement activities. Frequently, Federal employees have been sued in their individual capacities based upon regulatory or personnel decisions made in the context of their legitimate employment responsibilities.

Even though relatively few of these suits have been ultimately successful, they have still had an adverse and disruptive effect on the Department and the employees involved. The possibility of being subjected to litigation and personal financial loss serves to inhibit the managerial discretion and effectiveness of Government employees. Often, the real purpose of these suits is harassment of the individual official involved or they are used as part of a broader litigation strategy to disrupt criminal, civil or administrative enforcement proceedings being brought by the Government.

Aside from the chilling effect on day-to-day Government decision-making, the present situation hinders employee morale in a very personal sense. Being a named defendant in these cases means a cloud hangs over an employee's private financial transactions, interfering with the purchase and/or sale of a personal residence, obtaining automobile loans, and so on. Neither the interests of the country, nor the interests of Federal employees are served by allowing the current situation to continue. Further, the passage of S. 1775 is fairer to plaintiffs, as well, in the sense that an aggrieved party with a legitimate, valid complaint has a much better opportunity for a fair recovery against the United States.

Bivens-type actions also raise troublesome conflict of interest questions concerning the propriety of an individual employee-defendant being represented by a Justice Department attorney. Very often, in these cases, private counsel must be retained, either at the Government's expense or the employee's expense. Here again, the situation has a negative impact on employee morale and often impedes an expeditious settlement of the case. S. 1775 would resolve this conflict situation and relieve the Department of Justice of the burden of financing a private counsel program for Federal employees.

This legislation also recognizes that formal disciplinary action might need to be taken against individual employees, even though they would no longer be financially liable. In those instances where a constitutional tort suit results in a judgment against the United States (or where a settlement award is paid), the Attorney General must refer the matter to the head of the department or agency involved for appropriate disciplinary action. Thus, S. 1775 would utilize the existing adverse action procedures currently applicable to Federal employees, consistent with the terms of the Civil Service Reform Act (P.L. 95-454) and Office of Personnel Management regulations.

Finally, this legislation is preferable to similar versions now under consideration in Congress, because the Federal Government would retain the good faith defense currently available to employees in these suits. The retention of this defense by the United States, when it stands in the shoes of an employee, makes good economic sense and would allow for a more balanced judicial evaluation of the facts.

There have been numerous instances where tort actions have been brought against HUD employees in their individual capacities. The following cases demonstrate why the enactment of S. 1775 is needed and justified:

> Gammal v. Hamrock, et al., C.A. No. 79-15301, (D. Mass.)
>
> This is an action brought by an employee of the Department against three other HUD employees, in their individual capacities. The suit is based upon certain personnel and employment decisions made with respect to the plaintiff. The plaintiff is seeking monetary damages for alleged violations of his constitutional rights and alleged violations of 42 U.S.C. §1985. The problem raised by suits of this type is whether or not they serve to discourage justifiable personnel actions with respect to other employees. This case is still pending.
>
> Hill v. Landrieu, et al., C.A. No. 80-03322-WPG, (C.D. Cal.)
>
> This is a suit brought by unsuccessful bidders on property being disposed of by HUD. Plaintiffs alleged irregularities in the bidding procedure. Specifically, they asserted that they were misled by HUD employees, who were fraudulent and deceitful in their relations with the plaintiffs. In addition, they asserted that the HUD employees had discriminated against them in violation of their civil and constitutional rights. This action was dismissed on stipulation of counsel, after the Government filed appropriate motions. Dismissal came after several months, during which considerable time and effort had to be expended in preparation of defense material. One HUD employee considered

filing a counterclaim for libel and slander by plaintiffs, feeling that she had been unfairly defamed in her employment performance.

Cumberland Securities, Inc., et al. v. U.S. Department of Housing and Urban Development, et al., C.A. Nos. 75-H-1815; 75-H-1900 (S. D. Tex.)

In 1975, the Director of a HUD Area Office (position now known as "Area Manager"), the Deputy Area Director and an attorney in the Area Counsel's Office were sued in their individual capacities. They were charged with conspiring in a wilfully tortious interference with plaintiff's contract rights concerning the financing of a housing project. Soon after this lawsuit was filed, the Area Director resigned his position with HUD. The suit was a factor in his decision to resign. For over four years, whenever the former Area Director submitted a financial statement relating to his private business interests, he had to list this litigation as a possible liability. He also conferred with private counsel at his own expense when it became unclear as to whether or not the Justice Department would be able to represent him. A Motion for Summary Judgment for the HUD employees was granted on March 26, 1980.

Holifield Arms Apartments, Ltd. v. United States, et al., C.A. No. 77-0782. (N.D. Fla.)

In this litigation, filed in 1977, numerous HUD officials in Washington and the Jacksonville, Florida Area Office were sued individually. Plaintiffs alleged that a declaration of default on a HUD-insured mortgage was wrongful, that rent increases had been wrongfully denied, and they had been subjected to violations of their due process rights under the Constitution. The cost to the Government in defending this case, to date, has been considerable.

Samuel T. Isaac and Associates, Inc. v. Fred Taylor and the Government National Mortgage Association, C.A. 80-198 (E.D. Ky.)

This is a four count action in which the Executive Vice President of Government National Mortgage Association is named as a defendant in his individual capacity. In this $4 million suit, plaintiff alleges defamation, tortious interference with contract rights, and violations of his constitutional rights. Both compensatory and punitive damages are sought. The foregoing suit was filed during the pendency of several other lawsuits by the same plaintiff against HUD, GNMA and others. The GNMA Executive Vice President (Mr. Taylor) was then, and continues to be, indispensable to the defense of those lawsuits, notwithstanding his exposure to personal liability in the suit against him as an individual. As Executive Vice President, Mr. Taylor continues to risk additional claims by the same plaintiff because of the official decisions and activities that he must participate in affecting the plaintiff. In fact, he was recently was made an individual defendant by an amended complaint in a lawsuit by the plaintiff against the Federal National Mortgage Association. In that suit, Mr. Taylor faces up to $1.7 million in additional personal liability.

Again, the Department of Housing and Urban Development fully supports the enactment of S. 1775. The opportunity to submit these comments is greatly appreciated.

Very sincerely yours,

Samuel R Pierce Jr

Samuel R. Pierce, Jr.

STATEMENT FOR THE RECORD
OF
RAYMOND J. DONOVAN
SECRETARY OF LABOR
BEFORE THE
COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON AGENCY ADMINISTRATION
UNITED STATES SENATE

December 4, 1981

Mr. Chairman and Members of the Subcommittee:

Thank you for the opportunity to present the views of the Labor Department on S. 1775. This bill would amend the Federal Tort Claims Act to make the Government the exclusive defendant in common law tort actions involving Government employees acting within the scope of their employment. It would also, for the first time, make the Government liable for violation of a constitutional right by a public official. We note with approval the inclusion in the bill of a specific provision which makes available to the United States all defenses available to the employee and continues all defenses to which the United States would normally be entitled.

Let me say at the outset that the Labor Department strongly supports this commendable initiative. This legislation represents a continuation of efforts made in previous Congresses to address, in an equitable manner, the serious problem of the increasing number of lawsuits filed against Federal employees in their individual or personal capacities.

As currently constituted, the Federal Tort Claims Act makes the Government liable with certain exceptions, for injury or loss of property, or personal injury or death caused by the negligent act or omission of any employee of the Government while acting within the scope of his or her office or employment. Even though Congress has enacted several specific provisions that make the Government the exclusive defendant under certain circumstances, in nonconstitutional tort actions a plaintiff generally is permitted to sue both the Federal employee who is responsible for the alleged misconduct as well as the United States. There is no general provision for indemnificaiton of those Federal officials who are sued in their personal capacities. This results in an unfairness to the individual who is attempting to fulfill his or her Federal mission.

In 1971, the Supreme Court in Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971), declared that Congressional authorization was not required to expose individual Federal officials to personal liability for violation of Fourth Amendment rights. Since then, many so-called "constitutional" tort actions have been filed against Federal officials. These suits allege personal causes of action in tort arising directly out of a provision of the Constitution.

The Supreme Court has continued to adhere to the theory enunciated in Bivens and lower Federal courts have extended Bivens suits, i.e. constitutional tort actions, to claims arising out of almost the entire Bill of Rights.

Initially, Bivens type suits were filed primarily as a result of incidents involving law enforcement activities. Recently however, an increasing number of actions have been brought as a result of regulatory actions taken by Federal employees.

At the Labor Department we are responsible for enforcing a number of laws such as the Occupational Safety and Health Act, the Mine Safety and Health Act, the Employee Retirement Income Security Act, the Wage and Hour laws, and the child labor laws, which ensure the safety and health, and protect the rights of millions of working men and women in our society. Undoubtedly, the present state of the law can have a chilling effect on the vigorous enforcement efforts which are necessary to effectively carry out the Department's mandates. Moreover, it is harmful to the morale of conscientious Department employees who may be exposed to possible financial ruin as a result of actions taken to protect the rights of America's working people. Of course we recognize that Federal employees do act improperly at times. We believe however, that the appropriate method of dealing with such misconduct is through established administrative disciplinary procedures rather than through the tort claim process.

A meaningful remedy, such as that provided by S. 1775, to this unsatisfactory situation is needed. We hope that this measure will receive the support it merits to ensure its passage in this Congress.

Statement by the Department of State in Support of S. 1775

The officers of the Department of State share with those of other Executive agencies liability to suit by aggrieved persons seeking to hold them personally responsible for official acts. In addition, our Foreign Service officials have a special exposure because of official actions taken overseas. Of particular concern to the Department are suits against our consular officers arising out of their responsibilities for visas under the immigration laws and for the welfare of Americans abroad and against our doctors arising out of treatment of employees and dependents at overseas posts where other medical facilities are limited.

A number of suits in all these categories have been filed against State Department and Foreign Service officers, and the chilling effect on decision-making is real, particularly at middle and lower middle levels. There is so much concern that special efforts have been made by our Bureau of Personnel to stimulate the insurance industry to develop a private insurance package for Government employees.

It is not just the potential liability or the time taken from other duties to participate in one's defense that has this chilling effect. These suits are personal in every sense; the plaintiffs are often extremely bitter and their accusations personally abusive. When the defendant employee wins, it may be on technical grounds, such as the statute of limitations, which do not dispose of these allegations on their merits, and the allegations are left hanging after having been given wide currency within the agency and often in the public domain.

For these reasons, the Department of State strongly supports S. 1775.

S. 1775 generally conforms to the suggestions of the Department of Justice for legislation in this area so we merely note with approval such features as preservation for the Government of defenses available to the employee, referral to employing agency for possible disciplinary action, absence of special provision for attorney's fees, and elimination for Constitutional torts of the exception in the Federal Tort Claims-Act for claims arising in a foreign country (28 USC 2680(k)).

Under existing law and the provisions of S. 1775, a Federal employee can be sued personally for a common law tort if the subject act occurs overseas. Our experience is that suits based on alleged torts abroad can be just as disruptive as those for acts in the United States. Many Foreign Service employees spend a major portion of their careers carrying out official functions overseas; these functions include personnel work, immigration work, contract administration, procurement, and medical care. While abroad, they may be protected from suit in the foreign country by some degree of diplomatic or consular immunity, but they have no protection at all if suit is brought in the United States, -- and a number have been. Two Secretaries of State, one Deputy Secretary, a former Ambassador, a former Assistant Secretary of State, and numerous doctors and consular officers have been sued personally for both constitutional and common torts. (The Justice Department will represent them whether the act is here or abroad, but only if the tort is constitutional will S. 1775 provide protection.) We recognize, however, that removal of the 28 U.S.C. 2680(k) exception across the board would create major difficulties and could have unforseen consequences.

The most serious category of common law tort cases arising abroad is medical malpractice. The Foreign Service has an extensive overseas medical program with emphasis on those parts of the world where the local medical community is likely to be overworked, under-trained, and ill-equipped. If one adds to the normal hazards of practicing medicine under those conditions, the risk of personal liability which can run into hundreds of thousands of dollars, the results are obvious--doctors will not go at all or they will be ultra cautious in prescribing and treating.

The State Department medical malpractice legislation (now contained in 22 U.S.C. 2702; 94 Stat. 2155) was designed to provide protection for these medical personnel. However, one court has permitted suit against one of our doctors by ruling that because a suit against the Government cannot be brought for alleged malpractice abroad under 28 U.S.C. 2680(k) the provision of our legislation excluding suit against our employee is also inapplicable.

Other courts, applying substantially identical provisions in the Federal Drivers Act (current 28 USC 2679(b)) have reached a contrary conclusion. We believe that the latter is the better view and that establishing it in law for all tort cases arising overseas will accomplish the purpose of S. 1775 without opening the door to suits in the United States against the United States which would be governed by foreign law.

The exclusive remedy against the United States provided by subsection (a) of our statute (22 USC 2702(a)), like the exclusive remedy against the United States under 28 USC 2679(b) as it would be amended by S. 1775, was intended to apply whether or not the act occurred outside the United States as long as the employee was acting within the scope of his or her office or employment. We suggest, therefore, that the committee report make clear that the exclusive remedy provisions of 28 USC 2679(b) operate with respect to tort claims arising out of acts of employees overseas and brought in courts in the United States, plaintiffs may not recover from the United States in such cases. The retained provisions of the State Department legislation discussed below, taken with this legislative history, would provide full protection for our medical personnel against personal liability.

Section 8(e) of S. 1775 would repeal certain subsections of the Foreign Service Act of 1946 and amend others; however, those provisions were replaced in 1980 by 22 USC 2702, and the citation therefore should be "section 30 of the State Department Basic Authorities Act of 1956 (22 USC 2702)." Subsections (f) and (g), which are preserved but redesignated (a) and (b), will continue to permit the State Department to indemnify its medical personnel or provide medical malpractice insurance to indemnify such personnel in case of successful suits against them in foreign courts or in the case of suits in United States courts where the acts (giving rise to suit) might be found to have been outside the scope of employment. In event of such a finding by a court, however erroneous, the remedy against the United States under USC 2679(b) as amended by S. 1775 would not be available and such personnel could be personally liable.

U.S. Department of Transportation
Office of the Secretary of Transportation

General Counsel

400 Seventh St., S.W.
Washington, D.C. 20590

DEC 3 1981

Honorable Strom Thurmond
Chairman, Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

I am pleased to respond for the record in support of S. 1775, which would make the Government liable for constitutional torts and would also make it the exclusive defendant in all tort suits involving Government employees acting within the scope of their employment. As the Justice

Department has noted in testimony concerning H.R. 24, a bill similar to S. 1775 in both language and purpose, under current law Federal employees can be held personally liable in tort for all acts done in the course of their official duties which arguably violate the United States Constitution. In addition, although current law provides a remedy against the United States where the acts and omissions of an employee acting within the scope of his duties are actionable as common law torts, certain employees, such as air traffic controllers, may also be sued in their personal capacities.

The Department of Justice further noted, and we fully agree, that this specter of personal lawsuits depresses morale, chills vigorous and effective public action, and unfairly burdens the conscientious public offical in executing his or her federal duties. Many officials and employees of the Department of Transportation are involved in activities where the potential for personal liability for constitutional torts is particularly great. For example, members of the Coast Guard frequently board vessels to carry out inspections necessary to enforce the nation's drug, vessel safety, and environmental laws, while officials and employees of the Federal Highway Administration, the Federal Railroad Administration, the Federal Aviation Administration, and the Research and Special Programs Administration inspect various transportation facilities in order to enforce safety regulations. In addition, the Department has many employees, such as air traffic controllers, who are exposed to personal liability for common law tort damages. Thus, I believe that S. 1775 would be particularly beneficial to the ability of the Department's employees to vigorously carry out their responsibilities.

Section 3 of the bill would specify that with respect to constitutional torts the United States would be liable ". . .to the extent recognized or provided by applicable Federal law. . . ." Given the potential liability of the government stemming from Coast Guard activities, we believe that the usefulness of this provision could be enhanced by accompanying legislative history indicating that admiralty and maritime law are the Federal law to be applied with respect to the Coast Guard and other agencies operating vessels or otherwise engaged in traditional maritime activities, such as vessel boardings and inspections.

We support enactment of S.1775. Thank you for this opportunity to respond.

Sincerely,

Rosalind A. Knapp

Rosalind A. Knapp
Acting General Counsel

STATEMENT BY THE HONORABLE PETER J. WALLISON
GENERAL COUNSEL OF THE TREASURY DEPARTMENT
BEFORE THE
COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON AGENCY ADMINISTRATION
UNITED STATES SENATE

Mr. Chairman and Members of the Subcommittee:

On behalf of the Treasury Department, I would like to thank you for the opportunity to comment on S.1775, a bill to amend title 28 of the United State Code so as to make the United States the exclusive defendant in all common law and constitutional tort suits arising out of actions or omissions of Government employees acting within the scope of their employment. This bill responds to the growing body of law emerging from the Supreme Court's decision in Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971) under which Government employees have been held personally liable for acts which violated an individual's Fourth Amendment rights. The Court has subsequently created constitutional remedies for Fifth and Eighth Amendment violations also, and one may reasonably infer that the violation of any other constitutional right embodying fundamental "personal interests in liberty" may eventually be accepted by the Court as grounds for a cause of action (Bivens, 403 U.S. at 395).

While we do not quarrel with the Court's purposes in providing these constitutional remedies we are deeply concerned that the unintended consequences are crippling the Government's ability to carry out its responsibilities. We strongly support the purposes of S.1775 and believe that it will solve this problem by properly balancing the individual's legitimate right to recovery while protecting society's right to effective and efficient government.

The Bivens decision held that the violation of an individual's Fourth Amendment right to be free from unreasonable search and seizure "by a federal agent acting under color of his authority gives rise to a cause of action for damages consequent upon his unconstitutional conduct." (403 U.S. at 389). Davis v. Passman, 442 U.S. 228 (1979), extended the Bivens rationale to the due process clause of the Fifth Amendment. It was even further expanded by Carlson v. Green, 100 S.Ct. 1468 (1980), which not only extended the right of recovery to Eighth Amendment violations, but also held that the availability of administrative relief under the Federal Tort Claims Act did not preclude a simultaneous Bivens-type action based on the same operative facts.

The important point about a Bivens-type suit is that a Federal employee can be held personally liable. Prior to Bivens, the absolute immunity of the sovereign would protect a Federal employee. Since Bivens, however, an employee must establish that he or she acted in good faith, reasonably believing the actions taken to be legal, if liability is to be avoided. Butz v. Economou, 438 U.S. 478 (1978).

Bivens-type suits were designed by the Court to provide individuals with a means of recovering damages from Government employees who violated their constitutional rights, and to discourage Government employees from further unconstitutional actions. At the Treasury Department, however, we are concerned that Bivens-type suits may have been filed to harass specific

Government employees who, in doing their jobs conscientiously, have made themselves the targets of personal vendettas by persons displeased by statutorily mandated actions. Such suits also can and do have the effect--intended or not--of disrupting pending criminal, civil or administrative proceedings brought by the Government.

Ironically, those Government employees who are most diligent and conscientious in carrying out their statutory responsibilities are those most likely to be sued: Bivens-type suits alleging violations of due process are being used by those convicted of violating the law to retaliate against Government law enforcement personnel for vigorously enforcing the law; and by those who disagree with Government policies to retaliate against policy makers or regulators; and by those with personnel claims to retaliate against supervisors and managers; and by those being investigated by Congressional committees to retaliate against Congressional staffmembers who have zealously pursued factfinding investigations. The net effect of Bivens-type litigation has been to throw the baby out with the bathwater by discouraging not only unconstitutional action but any action by Government employees in the Executive as well as the Legislative branch.

The truth of this conclusion is demonstrated by the very small number of Federal employees who are actually held personally liable for their actions. The harmful effect on government, however, is still there. Deputy Attorney General Schmults has reaffirmed this assessment in his testimony before this Subcommittee on November 13, 1981.

Employee apprehension is fueled by the size of the damage awards sought, sometimes running in excess of $100,000. The fact that the Department of Justice may defend a Federal employee acting within the scope of his or her employment, does not and cannot allay a government employee's concern. As anyone knows who has participated in litigation, especially where a jury trial in a hostile community is involved, there is always the possibility of an unjust, adverse judgment. Such an award could be financially devastating. As the Subcommittee is aware, unlike the private sector, the Government does not generally indemnify its employees for such awards. Moreover, even if the actual award is small, employees should be justifiably concerned that a judgment will be recorded in their names personally and, hence, will jeopardize their good names and professional reputations.

In addition to having a judgment rendered against them individually, Federal employees confront other problems from merely being named as defendants. While such a suit is pending -- and some drag on for years -- an employee may be unable to obtain a car loan or a home mortgage. These are serious problems which S.1775 -- thanks to this Subcommittee -- is designed to address.

These problems are not limited to employees of the Executive Branch. Holton v. Benford, CA No. 81-1200 (unreported decision)(4th Cir., June 17, 1981), cert. denied (50 U.S.L.W. 3362)(November 3, 1981), demonstrates that the threat of Bivens-type litigation even reaches the Legislative Branch. The Supreme Court recently denied certiorari in this decision concerning a civil action against Congressional committee staff members for alleged violations of the plaintiff's Fourth Amendment rights pursuant to a committee investigation. The Fourth Circuit denied the staff members absolute immunity under either the Free Speech and Debate clause or the doctrine of official immunity. An amici curiae brief filed by the Speaker of the House, the Majority Leader and the Minority Leader, concisely states their concern:

> The questions presented by the petitioners in this case are ones affecting virtually every committee and subcommittee in the House of Representatives which, from time to time, conducts investigations into matters within their jurisdiction. The questions also have vital and indeed lasting impact upon the congressional aides who discharge the constitutional duties delegated to them by various committees and subcommittees to conduct legislative investigations.
>
> The Speaker and elected bipartisan leadership of the House, whose duty it is to preserve and protect the constitutional prerogatives of the body, believe it is essential to the maintainance of a vigorous and effective legislature that committees of the House be able to pursue legislative investigations free from the threat of civil lawsuits or accountability before the courts based on the performance of the investigative function and appear here to urge review of the court of appeals rulings which if allowed to stand will seriously impair and impede the discharge of Congress' legislative authority.

Opponents of this bill have argued before this Subcommittee that the Federal Tort Claims Act, as amended by S.1775, will fail to measure up to the requirements of Carlson v. Green, 100 S.Ct. 1468 (1980). They cite Carlson for the proposition that any legislative alternative to the Bivens remedy must be "equally effective" in providing (1) punitive damages, (2) a jury trial, and (3) deterrence. The inference from these arguments is that the Supreme Court will find anything less to be unconstitutional.

We take strong exception to this interpretation of Carlson which ignores the Court's explicit deferral to Congress on the sufficiency of the remedy.

> Petitioners argue that the availability of punitive damages or a jury trial under Bivens is irrelevant because neither is a necessary element of a remedial scheme. But that argument completely misses the mark. The issue is not whether a Bivens cause of action or any one of its particular features is essential. Rather the inquiry is whether Congress has created what it views as an equally effective remedial scheme. [Id., p. 1474 n.10].
>
> The Court goes on to say:
>
> Plainly FTCA is not a sufficient protector of the citizen's constitutional rights, and without a clear congressional mandate we cannot hold that congress relegated respondent exclusively to the FTCA remedy. [Id.][emphasis added].

We submit that S.1775 expresses the "clear congressional mandate" sought by the Court in Carlson.

We do not believe the arguments raised against S.1775 accurately reflect the decision in Carlson. Consequently, we do not feel these arguments warrant further refutation.

TREASURY EXPERIENCE WITH BIVENS-TYPE SUITS

I would like to describe to the Subcommittee the kinds of effects which Bivens-type litigation has had upon the employees of the Treasury Department and upon the discharge of the Department's responsibilities, and provide you with some specific examples of each. First, these suits have subjected Government employees to severe personal hardships. Second, such suits have also been employed in such a manner as to interfere with or obstruct ongoing administrative, regulatory and law enforcement proceedings. Third, these suits have chilled Government personnel at all levels, causing them to hesitate from taking any action which might subject them to personal liability in the future.

As to the first, I will cite only a few examples of the many instances in which employees of the agencies and bureaus of the Treasury Department have been subjected to the personal hardship and anguish of prolonged Bivens-type litigation.

In Dupuy v. Bates, et al., No. CV76-2956 (C.D. Cal. 1976), a Los Angeles District IRS officer was sued for over $1,000,000 in damages for his alleged unconstitutional seizure of a boat. As in all these cases, the decision will ultimately turn on disputed facts, and as a consequence the District Court judge has refused several motions for summary judgment. I will not attempt to argue the case, but ask this Subcommittee to consider what it must be like to live for five years under the threat of a $1 million damage award.

In Epps v. United States, et al., C.A. No. J-78-2373, (D. Md. 1981) the plaintiff sued the United States under the Federal Tort Claims Act and ten Baltimore District IRS officers under Bivens. The plaintiff alleged that during the period in which the IRS was in possession of her business, the property was vandalized. The count against the United States was dismissed because it fell within the exception to the Federal Tort Claims Act for matters arising from the assessment and collection of a tax. 28 U.S.C. 2680(c). The Bivens action against the IRS officers in the amount of $2.1 million, however, survived numerous motions for summary judgment. The complaint was dismissed as to seven of the IRS defendants prior to trial, and as to an eighth after the submission of evidence. The jury acquitted one and found the last, Field Branch Chief Baer, personally liable in the amount of $200,000. Subject to the court's rulings on certain post trial motions, this judgment will probably be appealed. Mr. Baer has retired, taking with him an unwanted memento of his government service.

Employees of the Office of the Comptroller of the Currency have experienced similar hardships as a result of Bivens-type claims. In a case filed in Pennsylvania in 1978, a national bank examiner had included in a bank report remarks critical of the bank president's bookkeeping practices. The examiner was then personally sued by the bank president for $10,000. The plaintiff contended that the examiner's remarks were made to obtain the president's dismissal and injure his reputation, in violation the Fifth Amendment's prohibition against taking of property without due process of law. The litigation was eventually settled out of court without payment of any monetary damages, but for one year in discovery and in hearings a Federal bank examiner was compelled to justify -- on pain of personal financial loss -- a statement which he believed it to be within the scope of his duties to make.

Customs employees have been sued in their individual capacities for delays in completing administrative actions where the delays were primarily attributable either to adherence to Customs procedures or to insufficient resources to match the workload. Two examples are illustrative:

In Seguin v. Eide, No. 79-4130 (1979), the Ninth Circuit found the Seattle Customs District Director personally liable for a four month delay in referring to the U.S. Attorney a forfeiture action against a vehicle used without the owner's knowledge in a smuggling attempt. Longstanding Customs policy called for deferring action on the vehicle owner's administrative petition while the related criminal proceedings against the smuggler were pending. The case had been delayed pending criminal action by the U.S. Attorney for a shorter period than the average delay in such cases within the Customs Service.

Customs officials were charged with having unreasonably delayed instituting forfeiture proceedings against a shipment of general merchandise in States Marine Lines v. Shultz, 498 F.2d 1146 (4th Cir. 1974). The court found that these charges stated a cognizable Bivens-type claim for damages against a District Director, an Assistant Commissioner, the Commissioner of Customs and the Secretary of the Treasury. While the case was eventually settled at the expense of the United States, several high officials of the Federal Government who had no direct involvement in this matter were exposed to personal liability.

If liability was justified in these two Customs seizure cases, we believe that it should have run to the Federal Government, which issued the procedures in the Eide case or failed to allocate the necessary resources in both cases, rather than to the employees who were required to follow those procedures or work within resource limitations in the face of a rising workload.

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The second type of harm to the Treasury Department from Bivens-type suits is direct interference with ongoing enforcement proceedings. Substantial problems are created as employees are dragged through drawn-out discovery and pre-trial proceedings. First, an agency and its employees' energies are diverted to the task of defending the Bivens-type suit. Second, the agency may have to assign additional resources to the enforcement proceeding, especially legal personnel, to represent those individuals now threatened by the Bivens allegations. Third, employees become less effective at the enforcement tasks at hand due to the anxiety generated by a potential personal liability.

Individual liability suits brought recently by several banks and individuals have delayed, obfuscated and interfered with the administrative enforcement functions of the Office of the Comptroller of the Currency. Examinations of several affiliated banks in one eastern state revealed practices that, under the Comptroller's policies and procedures, warranted the institution of formal enforcement cease-and-desist proceedings pursuant to 12 U.S.C. § 1818. The Comptroller commenced the appropriate proceedings by issuing Notices of Charges, charging the banks with unsafe or unsound banking practices and other violations of law. The Comptroller simultaneously issued Temporary Orders to Cease and Desist to restrain the banks from taking certain actions during the pendency of the enforcement proceedings. Exercising statutory rights under 12 U.S.C. § 1818(c), the banks (as well as other named plaintiffs) filed suit in federal district court for an injunction setting aside the Temporary Orders.

These complaints were then amended to add Bivens-type claims against every official in the Comptroller's office who had played any part in the preparation or approval of the enforcement proceedings. The theory of the amended complaints was that the named employees, acting in concert, had deprived the plaintiffs of Fifth Amendment property rights and Fourth Amendment privacy rights. The Comptroller is now faced with the complex task of proceeding with the enforcement proceeding while simultaneously defending against the Bivens complaints filed in the proceeding.

Constitutional claims generated in response to administrative enforcement proceedings, as illustrated by the above-mentioned case, confront the Government with significant legal and practical problems. First, the immediate effect is to increase the resources necessary for carrying on with the original proceeding. Government employees preparing for their appearance as witnesses in enforcement actions could be subjected to depositions and discovery requests in both the enforcement action and the Bivens action. Such dual demands present logistical problems for the Government witnesses and Government enforcement attorneys and impede those individuals' ability to carry out their duties.

Second, the fact that Federal employees have been named in their individual capacities simultaneously with the enforcement action adds different and unusual complexities to the Government's task. The interests of the individuals in the assertion of every available defense in the Bivens actions may conflict with Government policies related to some of those arguments. This results in added resource requirements to provide necessary legal support to carry forward both proceedings. Two, potentially separate, sets of discovery, including depositions and interrogatory responses covering the same operative facts would then have to be closely coordinated and managed. An ancillary problem may result from the use of a Bivens action in order to obtain greater discovery of Government records than would be legally permissible in the defense of the administrative enforcement action.

Third, such simultaneous proceedings could result in situations in which Government employees, on the advice of personal counsel, may be reluctant to testify in the administrative enforcement action out of concern that testimony elicited there may somehow be used to their individual detriment at the subsequent trial of the Bivens claims. The Government may then be placed in the highly undesirable position of either requiring such individuals to testify to their possible personal detriment, or forfeiting the administrative enforcement action.

Fourth, such situations obviously generate distraction and worry on the part of the effected Government employees, reducing their productivity and deterring them from pursuing the immediate proceeding in as vigorous a manner as the law demands.

Another Comptroller case illustrates yet another way in which Bivens-type suits may directly interfere with Government enforcement proceedings. This occurs when a plaintiff utilizes the threat of a Bivens-type suit to attempt to force an agency to carry out enforcement proceedings it otherwise would not have pursued. A Georgia doctor, who had participated in a real estate investment trust that lost over four million dollars, filed mandamus actions against the Comptroller of the Currency and his Regional Administrator in an attempt to force the Comptroller to investigate his claims against the national banks that had served as trustees for the REIT. Those actions were dismissed. The doctor then sued numerous parties involved with the real estate investment trust and the Comptroller's Regional Counsel, alleging a conspiracy to defraud him. Federal jurisdiction for that action was asserted under the Federal Tort Claims Act, 28 U.S.C. § 2671 et seq., even though this was not the proper jurisdictional basis for a personal liability allegation. The plaintiff sought punitive damages against the Regional Counsel in an amount of $12,500.

The Comptroller successfully argued that the action did not lie against the Regional Counsel personally, but rather against the agency, and eventually won a dismissal of the action against the agency as well. Subsequent actions were filed against the agency on the same facts, but alleging racketeering charges, and these were also dismissed. The burden on the Comptroller's office, however, was substantial and detrimental to the discharge of its mission.

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The third harm to the Treasury comes from the chilling effect which Bivens-type suits have on future actions of Government employees. The anxiety and hardships suffered by fellow workers who are sued in their individual capacities give Government employees reason to hesitate in the performance of their duties.

Cases such as the suit against the bank examiner arising from what he perceived to be a conscientious bank examination report exact a toll upon the Government in terms of examiner morale and complete and objective examination findings. Examiners must now ask themselves whether their written reports will expose them to personal liability.

The court's decision that the Seattle Customs District Director should have known that a 4 1/2 month delay was unreasonable, notwithstanding the absence of Ninth Circuit case law on the subject to guide the Director, has had a demoralizing effect on the entire Customs Service, given that a 4 1/2 month delay was unusually short for Customs cases at that time (1975).

Bivens-type suits have also been utilized by individuals to undercut necessary personnel and disciplinary actions taken by Government managers and supervisors. For example, a former Bureau of Government Financial Operations employee sued his supervisor in his individual capacity for $150,000 in compensatory and punitive damages, alleging that his separation from employment for disciplinary reasons, after less than six months on the job, violated his 1st and 5th Amendment rights. After nearly four years of unsuccessful pretrial motions, the case was finally settled. This complaint arose out of the normal everyday personnel and disciplinary actions for which every Government supervisor is responsible. The potential for similar complaints, wherein every supervisor can be held personally liable for every personnel decision he makes, strikes at the heart of efficient Government personnel management.

TREASURY COMMENTS ON S.1775

In light of Treasury's experience with Bivens-type litigation and given the explosion of such suits we anticipate after the Supreme Court's decision in Carlson v. Green, we believe that legislation addressing the personal liability of Government employees is absolutely essential. S.1775 fulfills this legislative need in a most satisfactory manner. In particular, we support S.1775 for the following reasons.

The immunity defenses--. Deputy Attorney General Schmults has already pointed out that past experience with Bivens claims shows extremely few instances of employee misconduct. We are confident that the integrity and professionalism of Federal employees will continue to be the principal guarantors against unconstitutional behavior. Additionally, the possibility of criminal sanctions for intentional violations, the presence of agency disciplinary procedures, and the availability to the plaintiff of injunctive relief all serve to safeguard against unconstitutional misconduct. The presence of the good faith defense not only provides another incentive, but also exonerates innocent employees while providing a judicial starting point from which expeditious agency action against bad-faith employees can proceed.

The number of constitutional tort cases will increase if the immunity defenses are removed. Plaintiffs will be encouraged to sue since, regardless of the Federal employee's good faith belief, the Government will be financially liable. In effect, the Government will be less of a defendant, and more of a no-fault insurer. The number of suits filed will mushroom, and the cost to the taxpayer will rise correspondingly. We do not believe that shifting these losses to the Government, and the taxpayer, with all of the attendant litigation that would imply, would be good social policy. Moreover, the documented problem with Bivens-type litigation -- bad faith or spurious plaintiff claims -- will be made worse by eliminating the immunity defenses.

Section 2680 exceptions --. As a general proposition, we believe that this legislation should not make any exceptions to the substitution of the United States as defendant in constitutional tort actions for the employee who has acted within the scope of his employment. S.1775 adheres to this proposition with the appropriate exception of certain minor quasi-governmental entities.

We note, however, that the absence of an analogue, in the sections dealing with constitutional torts, to the section 2680(a) exception now in the Federal Tort Claims Act, could conceivably be interpreted as intended to make the United States liable for damages resulting directly from the enforcement of a Congressional statute, despite the use of due care and lack of fault of any officer or employee of the Executive Branch in enforcing it. We have discussed this matter with the Justice Department and agree with them that the absence of this analogue cannot be used to construe a remedy in damages for injury resulting from an Act of Congress, whether or not that statute is declared unconstitutional. Such a drastic change in current law is clearly precluded by the provisions of S.1775 that preserve to the United States the absolute immunity of the Congress as it exists at the time this legislation is passed.

Attorney fees and court costs--. Opponents to this bill argue that any claimant should also be entitled to receive a reasonable attorney's fee and other litigation costs reasonably incurred.

These allowances, in light of the foregoing analysis, will tend to give rise to spurious and bad-faith litigation, with a deleterious impact on the Government and the taxpayer wholly out of proportion to their contemplated effect.

Even if such consequences were not likely, we do not believe this proposal comports with the underlying philosophy of the Federal Tort Claims Act, which was to place the Government in the position of a private party defendant. We perceive no policy benefit in altering this philosophy to the detriment of the taxpayer.

Miscellaneous--. Finally, we have some minor reservations about procedures associated with the Attorney General's scope-of-employment certification, and the approval of administrative settlements of tort cases. We are discussing these points with the Justice Department and anticipate that we will be able to suggest appropriate technical amendments to the Subcommittee by the time the bill is ready for markup.

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DEPARTMENT OF THE TREASURY
OFFICE OF THE GENERAL COUNSEL
WASHINGTON, D.C. 20220

DEC 16 1981

Dear Senator Grassley:

On December 2, 1981, I submitted a statement to your subcommittee on S. 1775, a bill to make the United States the exclusive defendant in all common law and constitutional tort suits arising out of actions or omissions of Government employees acting within the scope of their employment. A member of your staff requested additional material exemplifying Treasury's experience with such *Bivens*-type suits. Attached you will find two examples to supplement my earlier statement.

The fact patterns and allegations of the two pleadings attached are characteristic of most *Bivens* suits: the *Dickie* motion-to-dismiss memorandum is characteristic of the time and energy which the defense against such complaints demands; the *Allen* complaint adds a new twist by trying to freeze the Government employees' personal assets until the case is resolved.

Dickie v. United States et al., C.A. No. SA-80-CA-458 (W.D. Texas), involves a civil action for damages and injunctive relief against the United States, an Assistant United States Attorney, a Customs Special Agent and a BATF Special Agent. The plaintiff seeks to enjoin his investigation by an ongoing grand jury, and to receive damages for alleged violations of his constitutional rights by the defendants.

The complaint alleges numerous causes of action. Among them, the plaintiff alleges that the defendants utilized a grand jury to coerce false testimony from the his associates, and participated in the wrongful arrest and torture of a member of his family in the Republic of Mexico also in order to coerce false testimony. The plaintiff's complaint also alleges that a *jury trial* - a deliberative activity - and a *grand jury* - an investigative body - are one and the same, and that the Sixth Amendment applies to both. Responding to allegations such as these nonetheless involves a considerable expenditure of limited Government legal resources. Even when the allegations are specious, settlement costs are often less than unavoidable defense costs. The Government's Motion to Dismiss was filed in October, 1980. The District Court has still not ruled on the motion. During this period the Treasury Special Agents involved have had to live with the same fears and concerns that anyone being sued must feel.

The second complaint, ~~*Allen*~~ Adams *v. United States Marshals Service, et al.*, C.A. No. 81-180 (E.D. Kentucky) was just filed on October 19, 1981, against two Assistant United States Attorneys, various unknown U.S. Marshals and BATF Special Agents, and the plaintiff's former counsel. The plaintiff alleges that: (1) he was investigated, prosecuted and convicted; (2) he has served 28 months of his sentence and has 46 months to serve before being eligible for parole; (3) the defendants' actions, which resulted in his conviction and incarceration, violated his Fifth, Sixth, Eighth and Fourteenth Amendment rights; (4) he is entitled to $624,000 in compensatory and exemplary damages from the defendants individually; and (5) the court should freeze ". . . any portion of or all of the defendant's [sic] assets . . . until this matter is solved. . ."(numbered paragraph 17 on page 7 of the complaint)(emphasis added).

These cases are typical of many filed against Treasury Department employees. Their effects on conscientious enforcement of the law are obvious. This is a serious and pervasive problem which we believe S.1775 will correct. Consequently, we express our continued support for this bill.

Sincerely,

Peter J Wallison

Peter J. Wallison
General Counsel

The Honorable
Charles E. Grassley, Chairman
Subcommittee on Agency Administration
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Attachments

SUMMONS IN A CIVIL ACTIC

CIV. 1 (2-61)
(Formerly D. C. Form No. 45 Rev. (6-49))

United States District Court

FOR THE

WESTERN DISTRICT OF TEXAS

SAN ANTONIO DIVISION

CIVIL ACTION FILE NO. SA 80 CA 458

JACK DICKIE,

Plaintiff ,

v.

THE UNITED STATES OF AMERICA,
WAYNE F. SPECK, DENNIS D. McGONAGILL,
LAWRENCE A. VALIGURA, et al.,

Defendant s.

SUMMONS

To the above named Defendants : U.S. Attorney, 655 E. Durango Blvd., San Antonio, Texas78206 and U.S. Attorney General, Department of Justice, Washington, D.C. 20530

You are hereby summoned and required to serve upon

------------------------------David T. Lopez------------------------

plaintiff's attorney , whose address is 3935 Westheimer - Suite 202
Houston, Texas 77027

an answer to the complaint which is herewith served upon you, within 60 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

CHARLES W. VAGNER

Clerk of Court.

Deputy Clerk.

Date: September 11, 1980

[Seal of Court]

TE:—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

RECEIVED
IN U. S. CLERK'S OFFICE

[illegible] 1 [illegible] 1980

WESTERN DISTRICT
OF TEXAS
DIVISI[illegible]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

JACK DICKIE,)(
Plaintiff,)(
vs.)(
THE UNITED STATES OF AMERICA,)(
and)(
WAYNE F. SPECK, Individually and in his official capacity)(as Assistant U.S. Attorney and Chief, Criminal Division,)(Western District of Texas, Department of Justice,)(
and

DENNIS D. McGONAGILL, Individually and in his)(official capacity as Special Agent, Bureau of Alcohol,)(Tobacco and Firearms, Department of the Treasury,)(
and)(

LAWRENCE A. VALIGURA, Individually and in his)(official capacity as Special Agent, U.S. Customs,)(Department of the Treasury,)(
and)(

One or more JOHN DOES,)(Law Enforcement Officers whose identity at present is)(unknown to the Plaintiff, and who are sued herein in)(their individual and official capacities,)(

Defendants.)(

SA 80 CA 458

CIVIL ACTION NO.____________

ORIGINAL COMPLAINT AND APPLICATION FOR INJUNCTIVE RELIEF

COMES NOW, the Plaintiff, Jack Dickie, and complains to the Court as follows, prays for relief and applies for immediate interlocutory injunctive orders.

I

NATURE OF THE ACTION

1. This is an action arising under the Constitution and laws of the United States of America by which a citizen of the United States of America complains of gross abuse of authority and tortious conduct of certain named and unnamed law enforcement officers of the United States, who have damaged the Plaintiff and will continue to do so unless restrained by this Court and ordered to abide by and respect the legal and constitutional civil rights of the Plaintiff.

2. More specifically, this case arises under the Fourth, Fifth, Sixth, and Eighth Amendments to the Constitution of the United States; the Administrative Procedure Act, codified as 5 U.S.C. §§701 *et seq.*; and the Federal Tort Claims Act, 28 U.S.C. §2674.

II

JURISDICTION AND VENUE

3. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§1331, 1343(4), 1346(b) and 1361, in that this action arises under the Constitution and laws of the United States, seeks to vindicate civil rights of the Plaintiff, and relates to the wrongful official conduct of agents of the United States, and seeks to compel officers of the United States to perform their lawful duty.

4. Plaintiff asks that the Court exercise its pendent jurisdiction and apply the common law and statutes of the State of Texas as required to provide full relief on the civil rights claims and the claims of the Plaintiff against the Defendants in their individual capacities, to the extent that state claims arise from the same operative facts and should be treated as one case with the federal claims.

III

THE PARTIES

5. Jack Dickie, the Plaintiff, is an adult citizen of the United States, and at times material to his claims was a resident of San Antonio, Bexar County, Texas.

6. Defendant Wayne F. Speck, sued herein in his individual and official capacities, is an Assistant United States Attorney and Chief of the Criminal Division in the Office of the United States Attorney, Western District of Texas, Department of Justice. Service of process upon him may be had at the Office of the United States Attorney, First Floor, John H. Wood Courthouse, San Antonio, Texas.

7. Defendant Dennis D. McGonagill, sued herein in his individual and official capacities, is a Special Agent, Bureau of Alcohol, Tobacco and Firearms, Department of the Treasury, stationed and assigned to the Office of the said Bureau at Laredo, Texas, where service of process may be had upon him.

8. Defendant Lawrence A. Valigura, sued herein in his individual and official capacities, is a Special Agent for United States Customs, assigned to the Office of United States Customs, Eagle Pass, Texas, where service of process may be had upon him.

9. Additionally, Plaintiff has reason to believe and does believe that one or more additional Law Enforcement Officers of the United States of America have acted in the same or similar manner as the other individually named Defendants acted, and such Law Enforcement Officer or Officers are sued herein in their official and individual capacities as John Does, pending their specific identification, at which time leave of Court will be sought to amend the Complaint to include their actual names.

IV

CLAIMS FOR RELIEF

10. Each individual Defendant is an officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violation of federal law.

11. Wrongfully utilizing the badge of their office to show that their actions were taken under color of the authority of the United States of America, one or more of the individual Defendants, willfully and without any basis in fact, published or caused to be published at the top of the front page of the Sunday, January 13, 1980, edition of the San Antonio Light information purporting to be a news story which associated the name of the Plaintiff with alleged terrorist activities in the Republic of Mexico. The publication of such information, provided to the newspaper under a promise of anonymity to the individual Defendant or Defendants, was outside the scope of authority of the said Defendant or Defendants and was taken with the knowledge that the said Defendant or Defendants had no basis in fact for such information and with the malicious intent to injure the Plaintiff.

12. Utilizing their badge of office and within the authority provided by the United States of America, one or more of the individual Defendants abused the judicial process by communicating with persons known to have associated with the Plaintiff and threatening those persons with criminal prosecution unless those persons would agree to falsely testify against the Plaintiff and bring about the criminal prosecution of the Plaintiff. The acts alleged herein were taken by the individual Defendant or Defendants after he or they had been informed that the person contacted had no information which would by any interpretation connect the Plaintiff to any criminal activity.

13. Utilizing the badge of their office and within authority delegated to them by the United States of America, one or more of

the individual Defendants caused to be seized from private establishments numerous records of the activities of the Plaintiff, although there was no reasonable cause to believe that the Plaintiff had violated any federal law, or any other reasonable basis whatsoever for the seizure of those records.

14. One or more of the individual Defendants have uttered publicly allegations that the Plaintiff has engaged or is engaging in criminal activity, although the said Defendant or Defendants well knew that those allegations had no basis in fact, were totally groundless, and were uttered with the malicious intent to injure the Plaintiff. These actions of one or more of the individual Defendants were taken within one year of the filing of this lawsuit and constitute actionable tortious conduct under the common law and statutes of the State of Texas.

15. Utilizing the badge of their office and within authority delegated to them by the United States of America, one or more of the Defendants utilized a Grand Jury of this Court and the processes of this Court to threaten and maliciously prosecute persons known to have associated with the Plaintiff in an effort to coerce those persons into providing false testimony which could be utilized to bring wrongful criminal prosecution against the Plaintiff.

16. Utilizing the badge of their office one or more of the individual Defendants participated and assisted in the groundless and wrongful arrest of a member of Plaintiff's family in the Republic of Mexico and in applying torture and threats to that family member in an effort to induce false testimony against the Plaintiff, resulting in substantial and irreversible injury to the said family member, damaging the Plaintiff by causing emotional distress.

17. Utilizing the badge of their office and within the authority delegated to them by the United States of America, one or more of the individual Defendants abused the Grand Jury process by making false statements to members of the Grand Jury to prejudice

them against the Plaintiff and to deprive the Plaintiff of his constitutional right to a fair and impartial Grand Jury.

18. Utilizing the badge of their office and within the authority delegated by the United States of America, one or more of the individual Defendants abused the Grand Jury process by threatening persons called to testify before the Grand Jury with prosecution for perjury unless they agreed to give false testimony against the Plaintiff.

19. Utilizing the badge of their office and within authority delegated by the United States of America, one or more of the individual Defendants abused the Grand Jury process by seizing tangible objects and calling witnesses before the Grand Jury in an effort to coerce evidence which could be used against the Plaintiff, all the time knowing that there was no basis in fact for any criminal prosecution of the Plaintiff.

20. Utilizing the badge of their office and under authority delegated by the United States of America, one or more of the individual Defendants abused the Grand Jury process by breaching the statutory requirement of confidentiality and divulging to persons other than Grand Jurors the proceedings of the Grand Jury, in an effort to injure the Plaintiff.

V

INJUNCTIVE RELIEF

21. Unless restrained by order of this Court, the Defendants will continue in their wrongful acts, to Plaintiff's immediate and irreparable injury, for which Plaintiff has no adequate remedy at law.

22. After due notice and hearing as required by law, this Court should enjoin each and all of the Defendants, their agents, and all persons acting in concert with them, from continuing their wrongful course of conduct, specifically enjoining the Defendants from making unfounded statements regarding the Plaintiff, threatening

or coercing any person because of his or her association with the Plaintiff, from any additional activities related to any Grand Jury which has been prejudiced and biased against the Plaintiff by the wrongful conduct of the Defendants, and from arresting or seizing the property of the Plaintiff or any person who has associated with the Plaintiff without justification and full compliance with the Constitution and laws of the United States of America.

VI

MONETARY DAMAGES

23. The wrongful acts of the Defendants have damaged the Plaintiff by depriving him of his civil rights and the Constitution and laws of the United States of America and by causing him undue and severe emotional distress, and judgment should be rendered against the Defendants in an amount exceeding $10,000.00.

24. To the extent that the individual Defendants are liable to the Plaintiff in their individual capacity for acts done willfully and maliciously to damage the Plaintiff, judgment should be rendered against those individual Defendants in their individual capacities and in favor of the Plaintiff in an amount exceeding $10,000.00.

VII

ATTORNEY'S FEES

25. In order to vindicate and safeguard his interests, it was necessary for the Plaintiff to secure the services of David T. Lopez, an attorney in Houston, Texas, admitted to practice in the Western District of Texas, and Plaintiff prays that a reasonable attorney's fee be set and awarded by this Court as provided by law.

PRAYER

Accordingly, Plaintiff prays that the Defendants be cited to appear, and that after due notice and hearing, the Court issue its temporary injunction as prayed, and that upon final hearing that a permanent injunction be issued and that the Plaintiff recover from the Defendants compensatory damages in the amount to which the Plaintiff may show himself entitled at trial, the said amount to be at least $10,000.00, and that the Plaintiff recover from the individual Defendants in their individual capacities punitive damages in an amount to be set by the Court in excess of $10,000.00, that the Plaintiff recover the costs of this action, including a reasonable attorney's fee as an incident of such costs, and that the Court grant to Plaintiff any and all other relief to which Plaintiff may show himself entitled at law or in equity.

Respectfully submitted,

DAVID T. LOPEZ
Attorney in Charge for Plaintiff
3935 Westheimer - Suite 202
Houston, Texas 77027
(713) 965-9240

OF COUNSEL:

DAVID T. LOPEZ & ASSOC.

DAVID C. KELLUM, ESQUIRE
7326 Military Drive West
San Antonio, Texas 78227
(512) 674-3690

STATE OF TEXAS X
COUNTY OF HARRIS X

BEFORE ME, the undersigned authority, on this 10th day of September, 1980, appeared to me David T. Lopez, who after being by me duly sworn did depose and say that he is the attorney for the Plaintiff in the above styled and numbered cause, that he is authorized to make this affidavit, that he has examined the allegations in the Plaintiff's Original Complaint and Application for Injunctive Relief, and that the allegations, to affiant's knowledge and belief, are in all ways true and correct.

SWORN TO AND SUBSCRIBED before me this 10th day of September, 1980.

My Commission Expires:

Notary Public in and for Houston
Harris County, Texas

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

JACK DICKIE,)
)
Plaintiff)
)
V.) CIVIL NO. SA-80-CA-458
)
UNITED STATES OF AMERICA,)
WAYNE F. SPECK,)
DENNIS D. McGONAGILL, and)
LAWRENCE A. VALIGURA, ET AL.,)
)
Defendants)

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

Plaintiff brings this civil action for damages and injunctive relief against the United States, Assistant United States Attorney Wayne Speck, Customs Special Agent Lawrence Valigura, ATF Special Agent Dennis McGonagill, and one or more John Does. Plaintiff alleges that the Defendants, acting under color of their Federal authority, committed various wrongful acts in order to induce a grand jury to hand down criminal indictments against the Plaintiff, and divulged grand jury information and made false statements in order to injure the Plaintiff.

We submit that Plaintiff has failed to set forth an adequate jurisdictional basis for his complaint as required by Rule 8(a), Fed.R.Civ.P. Thus, as a matter of law, the court lacks jurisdiction in this case and Plaintiff's case must be dismissed in accordance with Rules 12(b)(1) and (6), Fed.R.Civ.P.

Plaintiff alleges jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343(4), 1346(b), and 1361. Additionally, Plaintiff seeks pendent jurisdiction in order to plead State tort claims arising from the same operative facts.

A. THE CLAIMS ALLEGEDLY ARISING UNDER 28 U.S.C. § 1331 SHOULD BE DISMISSED.

28 U.S.C. § 1331 gives the court jurisdiction over civil actions arising under the Constitution, laws, or treaties of the United States, where either the amount in controversy exceeds $10,000.00 or the action is against a Federal employee in his

Paragraphs 12, 15, 16, 17, 18, and 19 of the Plaintiff's claim allege various activities by the Defendants intended to bring about the "wrongful criminal prosecution" of the Plaintiff. Paragraph 13 alleges the seizure of records inferentially related to the same anticipated prosecution. The Plaintiff is the subject of an ongoing grand jury investigation. No criminal indictment has been handed down as of this date. Until criminal prosecution commences, the Plaintiff has not suffered any harm from the investigatory activities he alleges; there is no case and controversy. See, International Longshoreman's & Warehousemen's Union v. Boyd, 347 U.S. 222 (1954); Joint Anti-Fascist Refugee Com. v. McGrath, 341 U.S. 123, 140-41 (1951). Consequently, paragraphs 12, 13, and 15-19 should be dismissed pursuant to Rules 12(b)(1) and (6), Fed.R.Civ.P.

3. Standing.

Even if the aforementioned paragraphs presented a case and controversy, the Plaintiff has no standing to plead them. Paragraphs 12, 15, 16, and 18 allege "wrongful activities" perpetrated on persons other than the Plaintiff. Regardless of whether these alleged "wrongful activities" subsequently result in a criminal prosecution of the Plaintiff, the alleged activities infringed upon other persons' constitutional rights, not those of the Plaintiff. The Plaintiff has no standing to protest the violation of a third party's rights. Flast v. Cohen, 392 U.S. 83, 102 (1968. "...[A] federal court's jurisdiction therefore can be invoked only when the Plaintiff himself has suffered 'some threatened or actual injury resulting from the putatively illegal action....'" [Warth v. Seldin, 422 U.S. 490, 499 (1975).]

Insofar as paragraphs 13 and 19 allege that the Defendants "seized from private establishments numerous records of the activities of the Plaintiff," and "abused the grand jury process by seizing tangible objects...," Plaintiff fails to allege that he has standing to challenge the seizures since he does not claim any personal right in the records or objects allegedly seized. Brown v. United States, 411 U.S. 223, 229-30 (1973); Goldberg v. United States, 297 F. 98, 101 (5th Cir. 1924). The Plaintiff has no standing to complain of an unlawful seizure unless he owns or possesses that which is searched or seized. Cantrell v. United States, 15 F.2d 953 (5th Cir. 1926) (no interest claimed in premises searched), cert. denied, 273 U.S. 768. Consequently, paragraphs 13 and 19 do not allege violations of Plaintiff's Fourth Amendment rights. Nowhere does Plaintiff allege that he was forced to incriminate himself; nor that he was deprived of life, liberty, or property without due process, in violation of his Fifth Amendment rights. Plaintiff incorrectly attributes the Sixth Amendment with guaranteeing the "right to a fair and impartial grand jury..." [emphasis added] [paragraph 17] whereas the Sixth Amendment guarantees the rights of the accused in a criminal prosecution. Nowhere does Plaintiff allege the existence of a criminal prosecution necessary for the consideration of his Sixth Amendment rights. See, United States v. Mandujano, 425 U.S. 564, 571 (1976); Kirby v. Illinois, 406 U.S. 682, 688-89 (1972); Lacoste v. Blackburn, 592 F.2d 1321, 1323 (5th Cir. 1979); Caver v. State of Alabama, 577 F.2d 1188, 1195 (5th Cir. 1978). Finally, nowhere does Plaintiff allege anything that could be construed to constitute a violation of his Eight Amendment bail and punishment rights. Plaintiff simply does not adequately allege any claim arising under the Constitution. His complaint should be dismissed pursuant to Rule 12(b)(1) and (6), Fed.R.Civ.P.

Neither can Plaintiff's defanation allegations [paragraphs 11 and 14] be construed to present a violation of the right to privacy.

> "...plaintiff alleged that after the police had investigated a 'suspicious incident' involving him and had concluded that no crime had been committed, the police deliberately released to [radio station] KAGO a police report containing 'libelous and false statements' suggesting that plaintiff had committed a crime....
>
> "The district court dismissed the action upon the ground that the facts alleged would not, if proven, establish that Baker had been deprived of any right secured by the Constitution....
>
> "We agree. Under some circumstances there can be such a gross abuse of privacy as to amount to an abridgement of fundamental constitutional guarantees. See Griswold v. Connecticut, 381 U.S. 479 (1965)... But the

> invasion of privacy here complained of is not, in our opinion, so flagrant that it calls for invocation of the Constitution. We need not decide whether the facts alleged state a claim for breach of a common law right to privacy.... [Baker v. Howard, 419 F.2d 376, 377 (9th Cir. 1969).]

Without a violation of a constitutional right, there can exist no constitutional tort. Bivens, supra, at 396-97. However, Plaintiff can allege conventional torts pursuant to the Federal Tort Claims Act in order to state a claim arising under the laws of the United States. In general, the Federal Tort Claims Act provides exclusive remedy for personal injury claims arising from negligent or wrongful acts or omissions of a non-constitutional nature by Federal employees while acting within the scope of their employment. 28 U.S.C. § 2675(a). Thus, any tort claim arising from Plaintiff's allegations in paragraphs 12, 13, and 15-19 must be brought under the FTCA. In order to withstand a Rule 12(b) motion, Plaintiff must allege compliance with 28 U.S.C. § 2675(a), which requires that prior to institution of suit in a United States District Court under the Act, Plaintiff must first submit an administrative claim to the appropriate Federal agency. Mack v. Alexander, 575 F.2d 488, 489 (5th Cir. 1978). Altman v. Connelly, 456 F.2d 1114, 1116 (2d Cir. 1972). Plaintiff makes no such allegation. Hence, he offers no cause of action arising under the FTCA. Plaintiff's allusion to the Administrative Procedure Act is irrelevant since the APA is only concerned with judicial review of agency administrative actions. See generally, Califano v. Sanders, 430 U.S. 99 (1977). In conclusion, Plaintiff does not allege any claim arising under the laws and treaties of the United States.

Plaintiff's complaint should be dismissed pursuant to Rules 12(b)(1) and (6), Fed.R.Civ.P.

B. THE CLAIMS ALLEGEDLY ARISING UNDER 28 U.S.C. § 1343(4) SHOULD BE DISMISSED.

Section 1343(4) jurisdiction allows for civil actions to recover damages or to secure equitable or other relief pursuant to any act of Congress providing for the protection of civil rights. Consequently, Section 1343(4) provides jurisdiction expressly for the civil rights statutes (42 U.S.C. §§ 1981, et seq.). Giancana v. Hoover, 322 F.2d 789, 790 (9th Cir. 1963).

The only acts of Congress cited by Plaintiff are the Administrative Procedure Act and the Federal Tort Claims Act. Neither of these acts apply to the protection of civil rights. Section 1343 does not give the court jurisdiction over this complaint because Plaintiff fails to allege a prerequisite cause of action.

> "Because of the phrase 'civil action authorized by law,' Section 1343 jurisdiction is unavailable in the absence of an appropriate cause of action. In this sense, failure to state a claim under Sections 1981, 1983, and 1985 or other appropriate legal authority has the effect of depriving federal courts of subject matter jurisdiction under Section 1343. [Campbell v. Gadsden County Dist. School Board, 534 F.2d 650, 653 n. 3 (5th Cir. 1976).]

Consequently, Plaintiff's complaint should be dismissed pursuant to Rules 12(b)(1) and (6), Fed.R.Civ.P., insofar as it arises from Section 1343(4) jurisdiction.

C. THE CLAIMS ALLEGEDLY ARISING UNDER 28 U.S.C. § 1346(b) SHOULD BE DISMISSED.

Section 1346(b) jurisdiction allows for claims against the United States for monetary damages, injury, death, or property loss caused by the negligent or wrongful acts or omission of a Federal employee acting in his official capacity. Section 1346(b) is the jurisdictional basis for claims under the Federal Tort Claims Act.

Suits against Federal officers in their official capacities are in actuality suits against the United States which may not be maintained absent consent by the Government. Hawaii v. Gordon, 373 U.S. 57 (1963); Huntington Towers Limited v. Franklin National Bank, 559 F.2d 863, 870 (2d Cir. 1977). Insofar as Plaintiff's allegations are against the Defendants for actions taken within the outer perimeters of their official duties, they are absolutely immune from all common law or State law tort claims. Barr v. Matteo, 360 U.S. 564 (1959); Evans v. Wright, 582 F.2d 20 (5th Cir. 1978); Granger v. Marek, 583 F.2d 781, 784-85 (6th Cir. 1978); Expeditions Unlimited Aquatic Enterprises v. Smithsonian Institution, 566 F.2d 289 (D.C. Cir. 1977). Consequently, Plaintiff's allegations in paragraphs 12, 13, and

15-20 can give rise to FTCA claims but not to any common law or State law tort claims. This conclusion is unaffected by Butz v. Economou, supra, which was limited to constitutional tort claims and which Plaintiff cannot allege absent a supportable constitutional violation.

Insofar as Plaintiff is attempting to allege any FTCA claim, his complaint, as already shown, should be dismissed for failure to allege compliance with Section 2675(a). Even if he had alleged such compliance, Plaintiff could not raise an FTCA claim: under paragraphs 12, 18, 19 (abuse of process), and 13 (illegal seizure), and 15 (malicious prosecution), and 16 (wrongful arrest) since the alleged tortious conduct was perpetrated on third parties and not Plaintiff; under paragraph 17 (abuse of process) since the alleged tortious conduct concerned the deprivation of a right that does not exist (Sixth Amendment right to fair and impartial grand jury).

Insofar as Plaintiff claims in paragraph 16 that the alleged tortious conduct resulted in his emotional distress, Plaintiff fails to state a claim since he fails to allege willfullness, an indispensible element of the tort under Texas law. Stafford v. Steward, 295 S.W.2d 665, 667 (1956). Consequently, Plaintiff's allegations based on Section 1346(b) jurisdiction cannot arise under the Federal Tort Claims Act and they should be dismissed pursuant to Rules 12(b)(1) and (6), Fed.R.Civ.P.

D. THE CLAIMS ALLEGEDLY ARISING UNDER 28 U.S.C. § 1361 SHOULD BE DISMISSED.

Section 1361 jurisdiction allows the courts by way of mandamus to compel the performance of a duty owed to the Plaintiff. Such a duty must be a mandatory, ministerial act, and not the exercise of discretionary authority.

> "It is well settled that a requisite for jurisdiction in the United States District Court on the basis of Section 1361 is an allegation that the defendant officer or employee of the United States owes the plaintiff a legal duty which is a specific, plain, ministerial act 'devoid of the exercise of judgment and discretion.'... Carter v. Seamans, 411 F.2d 767, 773 (5th Cir. 1969). An act is ministerial only when its performance is positively commanded and so plainly prescribed as to be free from doubt." [J. E. Bremmeman Co. v. Schramm, 456 F.Supp. 269, 275 (D.C. Pa. 1978)].

Plaintiff requests the Court to:

> "...enjoin each and all of the Defendants, their agents, and all persons acting in concert with them, from continuing their wrongful course of conduct, specifically enjoining the Defendants from making unfounded statements regarding the Plaintiff, from any additional activities related to any Grand Jury which has been prejudiced and biased against the Plaintiff by the wrongful conduct of the Defendants, and from arresting or seizing the property of the Plaintiff or any person who has associated with the Plaintiff without justification and full compliance with the Constitution and laws of the United States of America." [Paragraph 22.]

Plaintiff, in effect, merely pleads that the Defendants should be enjoined from doing that which is illegal. No unperformed mandatory action is alleged. If Plaintiff's injunctive relief was granted, it would cripple an administrative agency's power to investigate "merely on suspicion that the law is being violated, or even just because it wants assurance that it is not." United States v. Morton Salt, 338 U.S. 632 (1950). The inquisitorial power granted to administrative agencies applies where sanctions are criminal as well as civil. United States v. Newman, 441 F.2d 165 (5th Cir. 1971). Hence, Section 1361 jurisdiction cannot support Plaintiff's claim for injunctive relief which should be dismissed pursuant to Rules 12(b)(1) and (6), Fed.R.Civ.P.

E. THE CLAIMS ALLEGEDLY ARISING UNDER PENDENT JURISDICTION SHOULD BE DISMISSED.

Plaintiff alleges that the Defendants caused to be published, and publicly uttered, false statements about Plaintiff. Paragraph 11 specifically states that such publication "was outside the scope of authority" of the Defendants. Paragraph 14 is silent concerning the capacity in which the Defendants uttered the alleged statements, but specifies that the utterances "constitute actionable tortious conduct under the common law and statutes of the State of Texas." Consequently, we infer that these two claims for relief do not rely upon Section 1346(b) and the FTCA, but rather rely upon the court's assumption of pendent jurisdiction.

The prerequisites for pendent jurisdiction, as laid down in Hurn v. Oursler, 289 U.S. 238 (1933), are the substantiality of the Federal claim, and that the complaint state a single cause of action which is supported by Federal and non-Federal grounds. Further, the State and Federal claims must derive from a "common nucleus of operative fact." United Mine Workers of America v. Gibbs, 383 U.S. 715, 725 (1966). Although the Hurn v. Oursler "single cause of action" doctrine can be very difficult to apply, Plaintiff's complaint represents an easy case. As to Plaintiff's Federal claims, they already have been shown on their face to be "plainly devoid of merit." Ray v. Marion County, Fla., 71 F.2d 509, 510 (5th Cir. 1934); Dixon v. Martin, 260 F.2d 809, 811 (5th Cir. 1958). Even if Plaintiff's Federal claims were substantial, they do not support the same cause of action as his State tort claims. Libby, McNeil, and Libby v. City Nat. Bank, 592 F.2d 504, 510 (9th Cir. 1978). Plaintiff's Federal claims allege injury from deprivation of his constitutional rights and future criminal indictment by a grand jury. On the other hand, Plaintiff's tort claims allege injury from public disclosure of information resulting in defamation. Neither group of claims supports the other; they are independent. That they allegedly arise from the same operative facts required by United Mine Workers v. Gibbs is irrelevant to their relation to a single cause of action. Plaintiff's complaint clearly fails to meet the requirements of Hurn v. Oursler and pendent jurisdiction does not exist to hear his tort claim allegations. The complaint should be dismissed pursuant to Rule 12(b)(1), Fed.R.Civ.P.

Respectfully submitted,

JAMIE C. BOYD
United States Attorney

By: Jack B. Moynihan
Jack B. Moynihan
Assistant United States
Attorney

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TEXAS

SAN ANTONIO DIVISION

JACK DICKIE, X
X
Plaintiff X
X
VS. X CIVIL ACTION NO. SA-80-CA-45
X
UNITED STATES OF AMERICA, X
WAYNE F. SPECK, X
DENNIS D. McGONAGILL, and X
LAWRENCE A. VALIGURA, ET AL., X
X
Defendants. X

MOTION TO DISMISS

Come now the Defendants, United States of America, Wayne F. Speck, Dennis D. McGonagill, and Lawrence A. Valigura, et al., by and through the United States Attorney for the Western District of Texas, and the undersigned Assistant United States Attorney, and respectfully request this Court to dismiss with prejudice all causes of action stated in the Complaint pursuant to Rule 12(b)(1), Fed.R.Civ.P., for lack of subject matter jurisdiction and Rule 12(b)(6) for failure to state a claim upon which relief can be granted.

Respectfully submitted,

JAMIE C. BOYD
United States Attorney

By: Jack B. Moynihan
JACK B. MOYNIHAN
Assistant U.S. Attorney

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

JACK DICKIE, X
X
Plaintiff X
X
VS. X CIVIL ACTION NO. SA-80-CA-458
X
UNITED STATES OF AMERICA, X
WAYNE F. SPECK, X
DENNIS D. McGONAGILL, and X
LAWRENCE A. VALIGURA, ET AL., X
X
Defendants. X

ORDER OF DISMISSAL

Came on to be heard the Motion of the Defendants to dismiss with prejudice all causes of action stated in the Complaint and it appearing to this Court that such Motion should be granted,

IT IS THEREFORE ORDERED that the above-styled and numbered cause be and is hereby DISMISSED.

Entered this _____ day of November, 1980.

UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

This is to certify that on this the 13th day of November, 1980, a copy of the Defendants' Motion to Dismiss, Memorandum of Law and proposed Order filed in Jack Dickie vs. United States of America, et al, Civil No. SA-80-CA-458, was hand-delivered to opposing counsel: Mr. David T. Lopez, Attorney at law.

Jack B. Moynihan

Jack B. Moynihan
Assistant United States
Attorney

CIV. 1 [illegible]

SUMMONS IN A CIVIL ACTION

United States District Court

FOR THE

EASTERN DISTRICT OF KENTUCKY

LONDON

TIMOTHY JOE ADAMS

Plaintiff

v.

CIVIL ACTION FILE NO. 81-180

UNITED STATES MARSHALS SERVICE;
JOHN M. COMPTON, and his official capacity as Assistant U. S. Attorney;
ROBERT TREVEY, and his official capacity as Assistant U. S. Attorney;
WARREN SCOVILLE, Attorney at Law;
ALCOHOL, TOBACCO & FIREARMS AGENTS UNKNOWN, and their servants, employees, successors in office, or otherwise associated in the administration of their order's or desires

Defendant

SUMMONS

To the above named Defendant :

You are hereby summoned and required to serve upon Timothy Joe Adams

plaintiff~~'s attorney~~, whose address is Reg.#00409-032
Delta Unit, Box 34550
Memphis, TN 38134-0003

an answer to the complaint which is herewith served upon you, within 60 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

DAVIS T. MCGARVEY 157-30-241
Clerk of Court.

Shirley Allen
Deputy Clerk.

[Seal of Court]

Date: October 21, 1981

P35
CERTIFIED 5557100 [illegible]
REGISTERED
INSURED

NOTE:—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

Eastern District of Kentucky
FILED
OCT [illegible] 1981
AT LONDON
DAVIS T. McGARVEY
CLERK, U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
DIVISION .... LONDON

Timothy Joe Adams,
Plaintiff,

V.

United States Marshals Service;
John M. Compton, and his official capacity as Assistant U.S. Attorney;
Robert Trevey, and his official capacity as Assistant U.S. Attorney;
Warren Scoville, Attorney At Law;
Alcohol, Tobacco & Firearms Agents Unknown, and their servants, employees, successors in office, or otherwise associated in the administration of their order's or Desires,
Defendants.

81-180

COMPLAINT

Eastern District of Kentucky
TENDERED
Date: 10-19-81
DAVIS T. McGARVEY
CLERK, U. S. DISTRICT COURT

I. JURISDICTION

This is a civil action authorized by Title 28, United States Code, Sections 1331 & 1361, to redress the depriviation of federally secured rights secured to plaintiff under the United States Constitution. The matter in controversy exceeds, exclusive of interests and costs, the amount of $10,000, as will hereinafter more fully appear.

II. PLAINTIFF

Plaintiff, Timothy Joe Adams was at times complained of herein a resident of Perry County Kentucky, and was in proceeding of an accused felon, in this same court; case docket 79-9. Further, since June 18,1979 plaintiff has been and continues to be incarcerated pursuant to a judgement and commitment order of this same court.

III. DEFENDANTS

(1). Defendant, United States Marshals includes those described herein, but are not known to plaintiff by name. The United States Marshals who arrested plaintiff, and the United States Marshals responsible for the fulfillment of promises of immunities, protections, finances ect., of being part of a plea bargain agreement.

(2). Defendant, John M. Compton, is legally responsible for the proper handling of criminal cases assigned him by his superior United States Attorney. He is further legally obligated to abide by his code of ethics and to assure proper administration of justice.

(3). Defendant, Robert Trevey, is legally responsible the same as defendant Compton supra.

(4). Defendant, Warren Scoville is legally and ethically responsible for the legal representation of persons who retain him as counsel or persons he is appointed to represent. He is legally responsible to assure that proper administration of justice is submitted to those he represents.

(5). Defendant, Alcohol, Tobacco & Firearms (hereinaft.. ATF) agents unknown are legally responsible to report accurate informations regarding their investigations and are to do all in their jurisdictional power to assure proper administration of justice.

IV. FACTS

(I). On or about March I7,1979 Marshals unknown arrested plaintiff in a hospital in Long Island, N.Y. Plaintiff was in the emergency room being treated for a hernia operation that had been performed earlier, of which plaintiff had strained. After being arrested by the Marshals, the hospital officials gave pain medication to the Marshals to be given plaintiff. While interrogating plaintiff in this painful condition, the marshals would not allow plaintiff this medication. After the questioning, the Marshals delivered plaintiff to a jail in New York City, and still refused plaintiff his medication. The next morning when the marshals transfered plaintiff to the New York Metropolitan Center, they informed plaintiff they had lost his medicine. It took plaintiff a total of three days to receive medical attention at the said MCC.

(2). On March 20,1979 upon arrival at the Laurel County Jail in London, Kentucky plaintiff was approached by the attorney Warren Scoville. He informed plaintiff that he had been retained to represent plaintiff & his brother Charles Adams.

(3). From Febyary II,1979 until June II,1979 the ATF, John Comrton, Robert Trevey and Warren Scoville knowingly suppressed evidence that proved that Charles Adams's testimony was inaccurate and allowed his false testimony to stand in obtaining an indictment and conviction against your plaintiff.

(4). Warren Scoville knowingly and purposely represented a conflict of interest between Charles Adams and plaintiff to assist the defendants Robert Trevey & John Compton to obtain a conviction against plaintiff.

(5). Warren Scoville knowingly and purposely represented a conflict of interest between Charles Adams and plaintiff; to plaintiff's prejudice,. (Charles Adams being the government informant & plaintiff being the one of which he accussed).

(6). On June II,1979 defendants Trevey and Compton, the Federal Marshals with Warren Scoville, entered into a conspiracy to willfully coerce plaintiff into a guilty plea.

(7). Warren Scoville misrepresented plaintiff to beleave he would only serve six (6) months to one (I) year at the Lexington Federal Correctional Institution, if plaintiff entered a plea of guilty.

(8). Warren Scoville breached his contract in not representing plaintiff on his appeal action 80-5100, after the Sixth Circuit Court of Appeals refused to allow him to withdraw.

(9). Warren Scoville, purposely misinformed this same court to withdraw as counsel of record on September I5,1981.

(I0). Warren Scoville failed to adequately or properly prepare his legal research as per the plaintiff's legal proceedings.

(II). Warren Scoville withdrew a very valuable legal defense for plaintiff in withdrawing plaintiff's incompetency defense.

(I2). Robert Trevey and John Compton perjured themselves to the Honorable Eugene E. Silers in stating under oath that no agreements had ever been made regarding the plaintiff's reasoning in pleaing guilty.

(I3). John Compton and Robert Trevey failed to properly label the ATF's Ballistics Report as "exculpatory evidence".

(I4). John Compton, Robert Trevey and ATF agents unknown purposely introduced a large quanity of "dynamite" adquired from their informant Charles Adams tb this same court as evidence pertaining to the Tesoro Bombing, when in fact it was completely irrevelant and was produced only as a mask to protect the perjured testimony of their informant Charles Adams.

(I5). Plaintiff has been incarcerated for over 28 months and is still yet to serve 46 months just to make parole, due to the coercion and malicious prosecution conducted by the defendants.

(I6). Plaintiff is in continuoues mental strain requiring medical treatment daily, due to the acts of all the defendants.

(I7). Plaintiff's marriage has been destroyed due to the defendant's actions.

(I8). Plaintiff's charactor has been permanently deformed due to the defendant's defamatory actions.

(19). Robert Trevey, John Compton, ATF agents unknown & Warren Scoville have willfully caused the illegal confinement of the plaintiff.

(20). Warren Scoville willfully misrepresented the plaintiff to beleave that he would be going through a jury trial, and had plaintiff pay the sum of $10,500 for such representation, when in fact Mr. Scoville knew he would not be representing plaintiff in a trial.

(21). The United States Marshals have wrongfully jeopardized the lifes of the plaintiff and his wife by not fulfilling their agreements with plaintiff.

V. LEGAL CLAIMS

The facts related above disclose a concerted and systematic effort by the defendants and their agents to deprive plaintiff of constitutionally secured rights, including, but not limited to, those enumerated in the succeeding paragraphs.

VI. FIRST CAUSE OF ACTION

Defendants, in willfully withholding exculpatory evidence and performing the malicious prosecution against the plaintiff have denied the plaintiff due process of law and have deprived the plaintiff of his liberty clearly in violation of the 5th, 6th, 8th & 14th Amendments of the U.S. Constitution.

VII. SECOUND CAUSE OF ACTION

The defendants in misrepresenting facts to plaintiff did coerce the plaintiff into a plea of guilty violating the 5th, 6th & 14th Amendments of the U.S. Constitution.

VIII. THIRD CAUSE OF ACTION

The defendants in removing plaintiff from a hospital, withholding his medication and interrogating him for several hours violated the 5th, 8th & 14th Amendments of the U.S. Constitution.

VIV. FOURTH CAUSE OF ACTION

The defendants in covering up the perjury of their informant clearly violated the 5th & 14th Amendments of the U.S. Constitution.

X. FIFTH CAUSE OF ACTION

The defendants in not fulfilling their agreements with plaintiff and his wife clearly violated the 5th, 8th & 14th Amendments of the

U.S. Constitution.

XI. SIXTH CAUSE OF ACTION

Warren Scoville in misrepresenting plaintiff to deprive plaintiff of $IO,500 is in violation of the 5th Amendment of the U.S. Constitution.

XII. SEVENTH CAUSE OF ACTION

The defendants in causing plaintiff's illegal incarceration violated the 5th, 6th, 8th & I4th Amendments of the U.S. Constitution.

XIII. EIGHTH CAUSE OF ACTION

The defendants in defamation of plaintiff's character violated the 5th, 8th & I4th Amendments to the U.S. Constitution.

XIX. NINTH CAUSE OF ACTION

Defendants in destroying plaintiff's marriage are in violation of the 8th & I4th Amedments of the U.S. Constitution.

XX. TENTH CAUSE OF ACTION

Warren Scoville in representing a conflict of interest violated the 5th & 6th Amendments of the U.S. Constitution.

XXI. ELEVENTH CAUSE OF ACTION

Warren Scoville in not preparing his legal research and in not producing exculpatory ecidence violated the plaintiff's rights under the 5th, 6th & I4th Amendments.

XXII. EQUITY

The plaintiff has no plain, adequate or complete remedy at law to redress the wrongs described herein. Plaintiff has been and will continue to be irreparably injured by the conduct of the defendants unless the court grant the relief which plaintiff seeks.

XXIII. RELIEF

Wherefore, plaintiff respectifully requests that the court enter a judgement granting him the following:

(I). As per Ist cause of action, plaintiff request $30,000 Compensatory damages, and $10,000 exemplary damages, divided amoung the mentioned defendants as the court would deem in the interest of justice;

(2). As per 2nd cause of action the plaintiff request $IO,000 compensatory damages, and $10,000 exemplary damages, divided amoung the defendants as the court would deem to serve the interest of justice;

(3). As per 3rd cause of action the plaintiff request $1,000 compensatory damages & $I,000 exemplary damages;

(4). As per 4th cause of action, plaintiff request $I,000 compensatory damages & $5,000 exemplary damages against the ATF agents unknown, Robert Trevey & John Compton, divided amongst them as the court would see proper;

(5). As per 5th cause of action, the plaintiff request $5,000 compensatory damages & $I0,000 exemplary damages against the Federal Marshals;

(6). As per 6th cause of action, plaintiff request compensatory damages of $5,000 & $I0,000 exemplary damages against Warren Scoville;

(7). As per 7th cause of action, plaintiff request $50,000 compensatory damages against Warren Scoville, John Compton & Robert Trevey divided amoungst them as the court see's proper; & $50,000 exemplary;

(8). As per 8th cause of action, plaintiff request $I,000 compensatory damages and $5,000 exemplary damages, divided amoungst the defendants as the court would see proper;

(9). As per 9th cause of action, plaintiff request $I00,000 compensatory damages and $250,000 exemplary damages, divided amoungst the defendants as the court would see fit;

(IO). As per I0th cause of action, plaintiff request $I0,000 compensatory damages and $I0,000 exemplary damages against Warren Scoville.

(II). As per IIth cause of action, plaintiff request $I0,000 compensatory damages and $I0,000 exemplary damages against Warren Scoville;

(I2). Plaintiff request reasonable attorney fee's be allowed him for the preparation of this action;

(I3). Plaintiff request this matter be tried by a jury in accordance with the 7th Amendment of the U.S. Constitution;

(I4). Plaintiff request that he be awarded $25,000 compensatory damages against Warren Scoville for breach of contract in Appeal Action 80-5I00 & $5,000 exemplary damages for the same;

(I5). That due to the excess abuse of the plaintiff's constitutional rights demonstrated herein, your plaintiff request the court for appointment of counsel.

(I6). That these proceedings will be allowed in forma pauperis due to plaintiff's indigence;

(I7). And that any portion of or all of the defendant's assets will be frozen until this matter is solved;

(I8). And any and all other reliefs the court would see to serve the interest of justice.

In conclusion, your plaintiff prays that the court will allow needed copies of this complaint to be copied by the Clerk's Office, due to Bureau Policy not allowing plaintiff to do such copying and that all needed process be also handled by the Clerk's Office.

I, Timothy Joe Adams, do hereby declare pursuant to the laws governing perjury, that I have read the contents of this complaint & further declare that their informations are True & Correct to the best of my abilities.

Timothy Joe Adams
Timothy Joe Adams
Timothy Joe Adams
Plaintiff, In Pro Se
Reg.# 00409-032
Delta, Box 34550,
Memphis, Tn. 38134-0003

Dated this I4th day of October, I98I.

Parole Officer
Federal Correctional Institution
Memphis, Tennessee 38134
"Authorized by the Act of July 7, 1955
to administer oaths (18 U.S.C. 4004)."

A True Copy Attest
Davis T. McGarvey, Clerk
U. S. District Court
B: Shirley Allen D. C.

OFFICE OF THE SPECIAL COUNSEL
U.S. Merit Systems Protection Board

The Special Counsel

1120 Vermont Avenue, N.W.
Washington, D.C. 20419
202/653-9000

November 20, 1981

The Honorable Charles E. Grassley
Chairman
Subcommittee on Agency Administration
Committee on the Judiciary
2226 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

I am pleased to comment on S. 1775, the proposed amendment of the Federal Tort Claims Act. The bill would substitute the United States as defendant in constitutional tort actions against federal employees. Where a judgment is rendered against the United States or a settlement or award is paid by the United States, the Attorney General would refer the matter to the head of the employing agency for any appropriate disciplinary action. While an individual civil servant would no longer be personally liable for tortious conduct committed in the course of his employment, he could be subject to discipline.

As the head of an agency charged with protecting the rights of federal employees and a member of the President's Council on Integrity and Efficiency, I am in complete agreement with the proposed legislation. It provides a means of compensating persons whose constitutional rights have been violated while ensuring that government officers remain accountable for their actions. Employee morale should improve throughout the government because civil servants will no longer face the potentially crippling financial impact of protracted lawsuits. As a result, more qualified, talented individuals will be willing to serve the United States. Better federal employees will, in turn, be more likely to safeguard the constitutional rights of the public.

Despite the large number of complaints filed in the past decade alleging constitutional torts, the United States has had to pay on only nine claims. From this small sample, it is difficult to predict how agencies might deal with employees who violate the constitutional rights of our citizens. While I fully support passage of the bill, I urge the committee to closely monitor the operation of the disciplinary provision to ensure that federal employees remain accountable for their actions.

I hope these comments will be of assistance in your deliberations. If you have any questions, please feel free to call upon me.

Sincerely,

Alex Kozinski

AK:SJM:HRM/mfh

Additional Statement for the Record

January 12, 1982

STATEMENT BY THE
FEDERAL EXECUTIVE AND PROFESSIONAL ASSOCIATION
ON H.R. 24 AND S. 1775, BILLS TO AMEND THE
FEDERAL TORT CLAIMS ACT

The Federal Executive and Professional Association was created April 1, 1981, through the merger of the Federal Executives League and the Federal Professional Association. For many years both of these organizations have been committed to representing the interests of Federal professional employees and improving the effectiveness of the Federal service through the attainment of high levels of professionalism. We are interested in H.R. 24 and S. 1775 because they touch on important aspects of the way in which Federal executives and professionals perform their duties.

H.R. 24 and S. 1775 are a legislative response to the forces set in motion by the Supreme Court in 1971 when it held, in the case of Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, that Federal employees could be sued for the recovery of money damages by persons claiming that the employees had violated their constitutional rights. Bivens involved allegations that the defendant agents entered the complainant's apartment without a warrant and arrested him for alleged narcotics violation; manacled him in front of his wife and children, and threatened to arrest them as well; and searched the apartment from stem to stern. The Court held that a damage action against the agents was a proper remedy for the alleged violation of the Fourth Amendment protection against unreasonable searches and seizures.

The doctrine subsequently was extended to violations of the First Amendment protection of free speech, Butz v. Economou, 438 U.S. 478 (1978) (allegations that defendants instituted an investigation and administrative proceedings against complainant to revoke his registration as a commodity futures commission merchant because he had openly criticized them); the Fifth Amendment protection against the deprivation of the equal protection component of due process of law, Davis v. Passman, 442 U.S. 228 (1979) (allegation that complainant was fired by a United States Representative because of her sex); and the Eighth Amendment proscription against cruel and unusual punishment, Carlson v. Green, 446 U.S. 14 (1980) (allegation that complainant's son died in a Federal prison because he received improper medical attention).

The Court justified its rulings principally on two grounds: first, that there should be a remedy for a violation of a constitutional guarantee, and damages is the traditional remedy; and second, that the potential liability for damages would act as a deterrent upon Federal employees against an unconstitutional exercise of their authority. A third justification also was given that the Congress has provided, in 42 U.S.C. 1983, which originated in the Civil Rights Act of 1871, that State officials acting under color of law shall be liable in damages for depriving persons of constitutional rights, privileges or immunities, and that to "create a system in which the Bill of Rights monitors more closely the conduct of state officials than it does that of federal officials is to stand the constitutional design on its head." Butz, supra, at 504.

In the decade since Bivens several thousand lawsuits have been filed seeking money damages from Federal employees for alleged constitutional violations, and more than 1500 suits are pending. 1/ Only nine of these actions have resulted in money judgments against Federal employees, and some of these are still being appealed. 2/ "Initially, Bivens suits were primarily filed as a reult of incidents involving law enforcement activities; in recent years,

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1/ Statement of Edward C. Smults, Deputy Attorney General, October 13, 1981, before the Subcommittee on Administrative Law and Governmental Relations, House Judiciary Committee, at 3-4.

2/ Ibid, footnote 11.

however, such suits increasingly have arisen out of regulatory or personnel actions taken by federal officials." 3/ Whether this surge of litigation has had the effect of deterring abuses of authority by Federal employees cannot be determined; but it has had the effect of impeding Federal investigations, interrupting the normal workings of Federal agencies, creating anxiety among Federal employees at the prospect of potential liability for substantial sums of money, and causing hesitation in the taking of actions which might lead to vexatious litigation. In sum, it appears that what has been deterred by the Bivens rule is the proper exercise of authority in many situations.

H.R. 24 and S. 1775 would eliminate the problem created by the Bivens doctrine by authorizing suits for money damages against the United States for constitutional torts and precluding damage actions against the individual employees by providing that such suits shall be the exclusive remedy of the injured party.

The Federal Executive and Professional Association favors these objectives. We agree with the Supreme Court that persons whose constitutional rights have been violated by Federal employees acting under color of law should be compensated. This is what we expect of the constitutional, democratic government for which we work. We also believe that Federal workers should not be exposed to the harassment of litigation and the risk of personal financial loss for doing their jobs. The Bivens exposure not only is unfair to the individual employees involved, it also is unfair to the public, because it deprives both the employee and the public of the professionalism in the performance of Federal functions which both have the right to expect.

H.R. 24 and S. 1775 satisfy the first of the Supreme Court's justifications for the Bivens rule, namely, the provision of a remedy in damages for the violation of constitutional rights, but they do not satisfy the second and third justifications of providing a deterrent to abuse of authority and comparability with 42 U.S.C. 1983. In analyzing whether a legislative solution can be fashioned which responds to these considerations while still avoiding the problems created by the Bivens exposure, it is useful to discuss the comparable situation of liability insurance against both personal and work-related damage actions.

Most Americans who drive motor vehicles carry or are provided liability insurance for personal and work-related trips. For most of us this insurance removes the thought of the risk of substantial financial loss from at least the forefront of our thinking whenever we take the wheel of a car or truck, although we may have some residual concern that insurance coverage may not be large enough. The more immediate concerns which act as a deterrent to negligent driving are, first, the risk of personal injury if we become involved in an accident; second, the inconvenience and disruption caused by an accident and its aftermath; third, the desire to avoid causing injury to others; and fourth, the embarrassing gossip and publicity which our being found guilty of negligence in an accident might entail.

A doctor or lawyer who carries malpractice insurance, while not incurring the risk of personal harm from improper performance of his or her professional duties (except from a distraught patient or client), nonetheless has other concerns which act as a deterrent against negligent and unprofessional work: the possibility that the insurance coverage might not be large enough; the desire to avoid injury to others; and the desire to avoid embarrassment. Most importantly, there also is the very real concern that an accusation, and particularly a judgment, of malpractice, would lead to a substantial loss of income through a reduction in patients or clients, as well as the risk of disqualification or disbarment from the further practice of his or her profession.

We understand that many States purchase liability insurance for their officers and employees. 4/ Assuming that this insurance extends to their liability under 42 U.S.C. 1983, State employees are not subject to the deterrence of the risk of financial loss as contemplated by the Supreme Court, but nonetheless are subject to the other deterrents applicable to workers who carry or are provided liability insurance for work-related damage actions.

3/ Ibid. 3-4.

The Federal Government is so large that it acts as its own insurer. The provision of law that a suit against the United States is the exclusive remedy, which now applies to suits for damages for accidents caused by Federal employees while driving motor vehicles and by Federal medical personnel, and would be extended to all common law and constitutional torts by H.R. 24 and S. 1775, is analogous to the provision of liability insurance for the Federal workers in these circumstances, except that the coverage is in effect unlimited, and the employee is not named and identified as the defendant in the lawsuit.

The Federal Executive and Professional Association is not comfortable with the prospect that a colleague who is found guilty of a gross abuse of authority in the deprivation of the constitutional rights of others would escape from all financial and professional penalty. Our position is similar to that of the medical and legal profession which makes provision through a medical society or bar association for suspension, disqualification, or disbarment for certain infractions of the standards of the profession.

To establish a system of deterrents for Federal employees comparable to that of doctors and lawyers who are covered by malpractice insurance, we suggest, first, that the law provide not only for actual damages or liquidated damages for constitutional torts, 5/ but also provide for punitive damages. There might be a limitation on the punitive damages, such as $100,000. The law might state the situations in which punitive damages could be awarded, or leave the matter up to the determination of the judge or jury. The award of punitive damages against the United States will signify that the judge or jury, speaking on behalf of the public, feels that the action which led to the constitutional violation is an egregious and unwarranted abuse of authority, and its repetition should not be tolerated in a democratic and constitutional government.

Second, we suggest that the law further provide that whenever punitive damages have been awarded in the case of a constitutional tort, a disciplinary committee of the peers of the Federal employee or employees will be formed to review the infraction. We suggest that the committee be drawn from nominations of Federal professional organizations such as the Federal Executive and Professional Association, the Senior Executives Association, and the Federal Executive Institute Alumni Association. The committee, in addition to reviewing the record of the case, would be empowered to conduct an independent investigation , interrogate and hear from the employees, and hold a hearing if desired. The committee would be authorized to impose a variety of penalties, including a fine of up to an amount equal to one-fourth of the employee's annual salary at the time of the infraction, suspension from the Federal payroll for up to three months, demotion, termination of Federal employment, and proscription against Federal reemployment for a period up to five years. The fine and the proscription against Federal reemployment would apply to those who no longer were on the Federal payroll at the time of the committee decision.

We believe that this system will satisfy the Supreme Court's concern for an adequate deterrence and State comparability, promote professionalism in Government service, and satisfy the public's desire for accountability and discipline by Federal employees, while still protecting the conscientious and responsible Federal employees from the kind of harassment and anxiety currently created by the Bivens exposure.

We note that H.R. 24 provides for reference of the matter to the head of the employee's agency for such administrative investigation and disciplinary action as may be appropriate. This is not satisfactory because the employee may no longer work for the agency, because the head of the agency may share some of the responsibility for the misconduct, and because the head of the agency may be motivated to bear down unjustifiably hard on the employee to shift blame from himself or herself.

4/ Griffin Bell, "Proposed Amendments to the FederalTort Claims Act," 16 Harv. J. Leg. 3, fn. 6 (1979).

5/ H.R. 24 and S. 1775 provide that the United States shall be liable for the greater of (A) actual damages or (B) liquidated damages of $1,000 or, in the case of a continuing tort, $100 a day for each day of violation up to a maximum of $15,000.

We note that both H.R. 24 and S. 1775 provide that the United States would be entitled to all of the defenses "heretofore available to an employee of the United States." Apparently the intent is to provide the United States the same kind of qualified immunity, such as a good faith defense, which has been held by the courts to be available to Federal employees in Bivens suits and to State employees in section 1983 suits. We object to this provision because we think that a person deprived of constitutional rights by a Federal employee should be entitled to compensation even if the Federal employees were acting in good faith. Also, making compensation available in all cases, makes the award of punitive damages in cases of egregious violations of authority a proper signal for invoking disciplinary proceedings by professional colleagues.

Lastly, we note that the American Civil Liberties Union in its testimony before the Subcommittee on Administrative Law and Governmental Relations of the House Judiciary Committee on November 5, 1981, recommended an impleader arrangement under which Federal employees, sued for constitutional torts, could pass the ultimate cost to the Government if they acted in good faith, but would have to suffer the "economic consequences of their wrongdoing" if they acted in bad faith. We object to this recommendation for at least two reasons: First, if the employee is judgment-proof, as many are, it denies compensation to the injured party in cases when it is most deserved; and second, because it gives the Government an incentive to attempt to prove that the employee acted in bad faith, a situation which is intolerable.